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COIMISEAN FEARAINN NA H-ALBA

Review of International Experience of Community, Communal and Municipal Ownership of Land

A report to the Scottish Land Commission

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Glossary

ABCD	Asset Based Community Development
BCLT	Burlington Community Land Trust
CBS	Community Benefit Society
CFT	Charter for Forest Territory
CLA	Community Land Act
CLG	Company Limited by Guarantee
CLT	Community Land Trust
CLU	Community Land Unit
CNPF	Centre National de la Propriété Forestière (National Centre for Forest Owners)
CPR	Common Property Regime
CRtB	Community Right to Buy
DEFI	Dispositif d'Encouragement Fiscal à l'Investissement en Forêt (Forest Investment Tax Incentive Scheme)
DTAS	Development Trusts Association Scotland
FCS	Forestry Commission Scotland
FECOF	Federation Europeenne des Communes Forestiers (European Federation of Municipal and Local Community Forests)
GIEEF	Groupeement d'Intérêt Économique et Environnemental Forestier (Forest Economic and Environmental Interest Grouping)
GFA	Groupeement Fonciers Agricole (Agricultural Land Group)
HIE	Highlands and Islands Enterprise
ICE	Institute for Community Economics
ILO	International Labour Organization
LOA	Livestock Owners' Association
LRRG	Land Reform Review Group
LRPG	Land Reform Policy Group
ONF	Office National des Forêts (National Forestry Office)
REP	Renewable Electricity Program
SCIO	Scottish Charitable Incorporated Organisation
SLC	Scottish Land Commission
SLF	Scottish Land Fund
SRUC	Scotland's Rural College
UN	United Nations
UZACHI	Union of Zapotecan and Chinantecan Forestry Communities



1 Executive Summary

Community landownership in Scotland is generally understood as ownership of title to land and/or assets by a community body, linked to a defined geographic community. It is a relatively distinct category of landownership, regarded as different to public ownership of land (e.g. by government agencies and non-departmental public bodies). In contrast, the interpretation of ‘community’ or ‘communal’ ownership of land varies in other countries and is often less clearly distinguished from public ownership. Municipal ownership – a form of state ownership where the land is owned by municipal bodies (e.g. communes) at different scales, is also relevant due to the high level of community control. Communal or municipal rights to land are relatively common globally and across much of Europe, with a growing, statutory recognition of rural communities as collective owners of land. This research was commissioned to provide an overview of relevant forms of community, communal and municipal landownership in other countries, and suggest how lessons from international experiences could be applicable in Scotland.

Approach

The project combined desk-based research with input from international advisers and case study analysis. The results were discussed at an international webinar in March 2019. Several themes of particular interest to the Scottish Land Commission guided the analysis: governance structures in other countries; community engagement and democratic accountability; land rights and responsibilities; underpinning policy; historical development of different systems and cultural connections to the land. The report is structured around description and analysis of four categories of community tenure and associated case studies (listed in the table below). The case studies are summarised in the report, with links to the full analysis of each country in the annexes.

Category of community tenure	Case studies
Collective properties and commons <i>Includes examples where the rights of the legal owner are restricted and other people hold beneficial use rights over land.</i>	1. England and Wales (Common land) 2. Italy (Communal property regimes) 3. Mexico (Communal agrarian tenure)
Municipal ownership and commonage <i>Includes examples where local government authorities manage land in the public interest, and where land is co-owned by the state and community with varying degrees of community input.</i>	4. Norway (State/community commons) 5. France (Municipal control of collective tenure) 6. Europe's forests (Common property) 7. South Africa (Municipal commonages) 8. Germany (Municipal land administration)
Third sector and Community Land Trusts <i>Includes examples where non-profit organisations own land with the primary aim of community benefit.</i>	9. USA (Community Land Trusts)
Customary tenure and indigenous groups <i>Includes examples where land is owned/managed by indigenous people.</i>	10. Kenya (Provision of collective title) 11. Norway (Indigenous rights) 12. Canada (Indigenous partnerships)



Key findings

Legal ownership of title is often not the only defining characteristic of communal and community ownership at a global level. Rights over specific resources, responsibilities for management, and strong local governance structures can also result in community-led approaches in places where outright ownership does not lie with the community. Nonetheless, legal ownership of title is a key aspirational goal for many communities, particularly where the socio-cultural context has historically limited and/or removed community rights. In some municipal ownership systems, a clear separation exists between the municipality or state as legal owner and the collective agricultural community, who retain specific use rights. For example, in Norway's municipal state commons, the state-owned forestry company is the legal owner and it carries out timber production on common land. Additional user rights, including grazing rights, and the use of timber for farm buildings, fencing, and firewood, are transferred to local farmers. In other places, the legal title is held by the municipality, with responsibilities for management retained by the state. For example, French municipal forests are considered as collective private property. Ownership is held by communes, with town councillors deciding on management priorities. Responsibility for implementing forest management is delegated to the Office National des Forêts.

Policy and legislative mechanisms play an important role in establishing and protecting communal and community land systems internationally. Despite the removal of much community-based tenure during the 20th century, there is growing statutory recognition at the global scale of collective tenure by rural communities. For example, a legal basis has been established for agrarian communities in Mexico to enhance security of tenure. This is not a trend limited to rural communities: legislation related to Community Land Trusts in the USA has emerged to provide a stronger legal framework for their future development, which occurs predominantly in urban areas. A number of specific legislative measures have also been targeted at improving the accountability of decision-making processes and increasing the opportunities for communities to have meaningful input. An example in England is the establishment of a legal basis for Commons Councils.

The level of security of tenure and the degree of local control vary within and between the different categories of tenure. Municipal ownership and third sector/Community Land Trusts were found to deliver higher levels of security of tenure than the other categories. Many of the examples of municipal and third sector ownership considered in the report also reflect many of the characteristics of community ownership in Scotland, such as an emphasis on local-level control over management of the land/asset(s). For example, in Norway, where the areas covered by municipalities are much smaller than in Scotland, greater local control over decision-making is possible. Where municipal ownership models occurred at a larger scale, this was found to have direct implications for the degree of community control. For example, in the USA,



Community Land Trusts operating at a large scale experienced challenges in terms of defining the relevant community and empowering the community effectively.

The historical development of land rights illustrated the importance of power relations and the role of markets in influencing land reform over time. Land reform legislation was not found to exist in isolation from historical land rights claims and the reallocation of land and land rights in some case studies. The potential impacts (positive or negative) of any reform measures related to communal and community ownership were likely to have been affected by wider socio-economic factors.

Other key findings relate to:

- The relatively low intensity of management on many common land areas, which has led to these areas being designated and maintained in the long term. This provides a range of ecosystem services and protects cultural systems. This presents an interesting counterpoint to the prevailing emphasis on agricultural productivity and economic growth.
- The increasing interest in municipal/third sector ownership models internationally to control the availability and cost of local housing stock.
- Clear information and records/registers of community tenure systems, which are important to avoid the potential for loss of rights as demands on resources and government policies change over time.

Lessons for Scotland

There is scope to develop alternative communal and community models of ownership in Scotland, which draw on the case studies examined in this report.

- Learning from experience in England and the USA, there is an opportunity to investigate further the potential application of the Community Land Trust model to deliver affordable housing in Scotland. International experience shows the importance of developing strategic partnerships within this model to facilitate growth and impact. There is scope to formalise the role of the public sector and other non-governmental organisations in relation to CLTS, to enable communities to access other funding networks to support this approach.
- In Scotland, anchor organisations (predominantly development trusts) play a critical role in community asset ownership and management. International experience from Community Land Trusts highlights the importance of developing bridging or 'umbrella' organisations at a regional level to oversee anchor organisations and provide co-ordinated guidance and support, as well as a conduit into national policy processes. Such approaches deserve future consideration in Scotland, given the ongoing expansion in the number of anchor



organisations and their increasingly key role in community development and services delivery.

- Municipal ownership may offer considerable potential in Scotland, however, the existing local authority framework (and specifically the large scale of local authorities relative to municipal structures in some European countries) represents a key challenge for implementation. Nevertheless, there is potential for collaborative approaches to land and asset ownership and management between communities, local authorities and other public bodies, similar to the international examples studied in this report.
- Partnership or 'hybrid' models of landownership involving communities (of place and of interest), non-governmental organisations, private landowners and the state deserve further attention. Existing partnership models developed in Scotland under the National Forest Land Scheme for shared delivery of community forest management offer a starting point. Partnership models may offer particular potential for housing and renewable energy (e.g. see the Canada and USA case studies) potentially releasing access to otherwise out of reach funding.
- Collective private models of ownership, equivalent to the state incentivised model of collective private forest ownership in France, may have potential in a Scottish context. Such approaches offer the potential for building new frameworks of collaborative land management and challenging the prevailing culture of exclusive private ownership of land and assets, as well as delivering wider public benefits through taking landscape scale approaches to management.
- The findings of this report are of particular relevance to the ongoing Local Governance Review¹ which aims to reform the way that Scotland is governed to give greater control to communities.

¹ The Local Governance Review in Scotland which is being conducted by COSLA and the Scottish Government (2018-2019) see: <https://www.gov.scot/policies/improving-public-services/local-governance-review/>



2 Introduction

In Scotland, what constitutes ‘community landownership’ is reasonably well established: ownership (legal title and a generally exclusive right of possession) of land and/or assets by a community body that is locally-led and linked to a defined geographic community (Scottish Government, 2017).

Community ownership in Scotland is therefore predominantly ‘place-based’ and linked to outright ownership, although it is also recognised that various partnerships and lease arrangements exist between communities and landowners. In this sense, ‘community ownership’ in Scotland is a relatively distinct category of landownership, which is generally seen as different to public ownership of land (e.g. by Forestry Commission Scotland, a non-departmental public body and the largest single landowning entity in Scotland). However, certain exceptions such as common good land might be classified as community assets in a broad sense.

In contrast, the interpretation and conceptualisation of ‘community’ or ‘communal’ ownership of land varies considerably across Europe and further afield, and is often less clearly distinguished from ‘public ownership’. This research considers examples of community, communal and municipal landownership in other countries and suggests how lessons from these international experiences could be applicable in the Scottish context.

2.1 Aims of the research

The aims of this research were to:

1. Provide an overview of relevant forms of community, communal and municipal landownership outwith Scotland, focussing on the interaction between governance structures, management objectives, the distribution of land rights and cultural perceptions;
2. Suggest how lessons from international experiences could be applicable in a Scottish context to further support the expansion, and the development of a long-term vision, of sustainable community ownership.

The research also:

- a) Describes how the separation of land rights and responsibilities from the title works in practice, and any underpinning legislation that protects such arrangements;
- b) Examines the governance structures and management priorities of appropriate municipal landowners, with particular reference to community engagement and democratic accountability, and assesses whether in practice such structures could accurately represent community ownership;



- c) Briefly describes the historical development, modern context, and cultural perceptions of community, communal, and municipal owned land through the use of relevant case studies;
- d) Identifies relevant current policy, legislation, or other mechanisms that support community, communal, and municipal ownership; and
- e) Examines if and how other jurisdictions use community, communal, or municipal ownership to directly or indirectly support wider policy aims similar to those of the Scottish Land Commission.

2.2 Methodology

This project combined desk-based research with input from international advisers and analysis of several case studies. This section explains the methodology in more detail.

2.2.1 Desk-based international evidence review

The research team reviewed academic and other literature to explore international evidence relating to a number of themes, including:

- (Local) governance structures and management priorities of different owners;
- Realities and perceptions of community engagement (e.g. usage rights as opposed to outright ownership);
- The extent of separation of land rights and responsibilities from the land;
- Cultural connections with the land; and
- The concentration and extent of private ownership and how this impacts (or not) on the extent of community, communal and municipal landownership.

The desk-based review of evidence was supported by four international advisers who are experts on landownership outside Scotland:

1. Catriona Knapman (linked with the International Institute for Environment and Development, London)
2. Dr. Frode Flemsæter (Ruralis, Norway)
3. Dr. Matthew Hoffman (University of Southern Maine, USA)
4. Prof. Juanita Pienaar (Stellenbosch University, South Africa)

2.2.2 Case study analysis

The research included analysis of 12 international case studies, focussing in-depth on eight case studies, with four shorter case studies included due to their wider relevance ([Italy](#), [Canada](#), [Kenya](#) and [Common property regimes in Europe's forests](#)). The case studies provided examples of community, communal and municipal tenure in other countries and were selected in consultation with the Scottish Land Commission. The



case studies were chosen to reflect the range of levels of security of tenure and the degree of local community control evident in the different countries. The final set of case studies included a larger number of municipal cases due to their potential relevance to Scotland. For each in-depth case study, information was gathered from written evidence available in existing publications and short phone/Skype interviews with one or two relevant experts in the case study countries. The latter enabled the research team to gather an expert view and check the accuracy of the final case study documents produced for inclusion in the [annexes of this report](#). The case studies consider four key themes:

- History and policy/current governance context
- The mechanism(s) of ownership/tenure
- Extent and process of community control
- Key challenges and future directions

The case studies are organised according to the types of tenure analysed in the main body of the report:

- Collective properties and commons ([England and Wales](#); [Italy](#); [Mexico](#))
- Municipal ownership and commonage ([Norway](#); [France](#); [South Africa](#); [Germany](#); [Common property regimes in Europe's forests](#))
- Third sector and the evolution of Community Land Trusts ([USA](#))
- Customary tenure and indigenous groups ([Norway](#); [Canada](#); [Kenya](#))

2.2.3 International webinar

The research team designed and facilitated an international webinar which took place at the James Hutton Institute in Aberdeen on Tuesday 5 March 2019. The webinar enabled a range of participants to engage with the research, either in person in Aberdeen or via the online connection. Following a short overview of the interim findings of the research, the participants discussed the emerging results and offered their insights into the key lessons relevant to the ongoing processes of changing landownership in Scotland. In summary, the webinar aimed to:

1. Draw out implications for Scotland from international experiences of community, communal and municipal landownership;
2. Interrogate international project advisors, representatives of case studies, and key informants to incorporate their knowledge and experience of other contexts, e.g. regarding the potential barriers/challenges experienced elsewhere; and



3. Link practitioners and researchers working on community, communal and municipal ownership of land internationally, for the purposes of transdisciplinary knowledge exchange.

Webinar participants included: Scottish Land Commission staff and Commissioners; representatives from other Scottish organisations interested in land reform; the project's international advisers; and representatives from the case studies. A list of participants can be found in [Annex 13](#). Detailed notes were taken by the research team and the webinar was recorded by the WebEx software, with participant consent. Key discussion points from the webinar have been incorporated into the synthesis section of this report and the full webinar report is in [Annex 14](#).

2.3 Structure of the report

The remainder of this report is structured as follows:

[Section 3](#) provides an overview of community ownership models and relevant policy in Scotland.

Sections 4 to 7 review approaches to community, communal and municipal ownership of land in European and other countries:

[Section 4](#): Collective properties and commons

[Section 5](#): Municipal ownership of land

[Section 6](#): Ownership and management by the third sector (focusing on the evolution of community land trusts)

[Section 7](#): Customary tenure and indigenous groups

Each section refers to key findings from the relevant in-depth and shorter case studies. The full case studies can be found in the [annexes of this report](#).

[Section 8](#) synthesises the findings of the material reviewed in the previous sections, reflects on the findings of the case study analyses and the webinar discussion, and presents relevant lessons for these types of landownership in Scotland.



3 Community tenure in Scotland

3.1 Background

Facilitating community ownership of land and assets is a cornerstone of the current Scottish land reform agenda. The majority of community acquisitions of land in Scotland have occurred in the last 20 years², including a number of high-profile 'buyouts' of private estates by community groups (Land Reform Review Group, LRRG, 2014). This shift has been influenced by relevant land reform legislation (including the Land Reform (Scotland) Act 2003) and the establishment of key support mechanisms (see Mc Morran et al. 2018). The organisational and legislative framework for community acquisition has shaped many aspects of the acquisition process for communities – including the definition of community and the structure of community bodies engaging in buyouts.

Critically, community ownership in Scotland has emerged in direct response to the arguably unique status quo – namely that Scotland continues to exhibit one of the most concentrated patterns of private landownership in the world (LRPG, 1998; Wightman, 2000). The dominance of large-scale private owners has been associated with the loss of cultural ties between communities and the land in Scotland, as well as issues of insecurity, neglect, and disempowerment, which have been linked to localised community decline due to neglectful and absentee private landownership (Macaskill, 1999).

This contrasts with the situation in some European countries, where communities are often more 'culturally embedded' in the land, with larger numbers of individuals sometimes more directly involved in land management. For example, a review of forest ownership identified that Scotland had the lowest number of forest owners per head of population in Europe, with 0.1% of the population owning woodland, relative to 8.4% in Finland and 5.5% in France (Wightman, 2012). In many European countries, a more established system of common land also exists, although how 'community ownership' is practised and conceptualised can vary considerably (Aiken et al., 2008; Živojinović et al., 2015; Wily, 2018a).

In Scotland, communities have sought to address this imbalance by acquiring land and assets with the aim of enhancing local socio-economic development and retaining local populations (LRRG, 2014). Ownership of land (and associated assets and development rights) by community bodies is therefore increasingly viewed as a mechanism for facilitating community retention and growth, employment creation and inward investment and capacity building (Mc Morran et al., 2014).

² Since 1990, the total area of community owned land has increased more than fivefold, with a rapid expansion between 2001 and 2006 (coinciding with the first Scottish Land Fund), with a slower rate of growth since 2006 (Scottish Government, 2017).



Community bodies acquiring land and/or other assets in Scotland take a number of forms. In their assessment of the area of land under community ownership in Scotland, the Scottish Government (2017) defined ownership as relating to a community body obtaining a legal title and exclusive right of possession³. A relevant 'community body' in this context is required to have a number of essential characteristics, including:

- i) a clear definition of the geographical community to which the body relates;
- ii) a membership open to all community members;
- iii) being locally-led and controlled;
- iv) a core focus on sustainable development of the local area;
- v) a non-profit distributing structure; and
- vi) having evidenced a sufficient level of community support/buy in (Scottish Government, 2017).

Ownership of land by community bodies currently represents a small proportion of Scotland (2.9% or 227,526 hectares⁴). Over 85% of this land is on just 13 large landholdings, as a result of whole estate buyouts (Scottish Government, 2017). A further distinctive characteristic of community ownership in Scotland is that the vast majority (in terms of land area) has occurred in the North West of the country, with two thirds of the Western Isles under community ownership⁵.

Nevertheless, these acquisitions have been directly linked with far-reaching socio-economic and environmental outcomes. Examples include: increased local-level investment and business development; population retention; employment creation; community empowerment and capacity building; and sustainable land management (e.g. Slee et al., 2008; Skerratt, 2011; Hunter, 2012; Bryan and Westbrook, 2014; Mc Morran et al., 2014; Mullholland et al., 2014).

Despite these positive impacts, communities engaging in acquisitions or those having acquired land and/or assets often encounter a wide range of challenges. These include: legislative and administrative hurdles; limited funding availability (for purchase and subsequent development); obstructive landowners; ensuring economic viability of the

³ This Scottish Government assessment acknowledged that communities lease (i.e. from Forestry Commission Scotland), manage and jointly own (i.e. equity stake) land/assets, but for the purposes of determining their estimate of the total area of land under community ownership a more restricted focus on outright ownership was taken.

⁴ In June 2017, as estimated by Scottish Government in their annual publication: <https://www.gov.scot/publications/estimate-community-owned-land-scotland-2017/pages/1/>

⁵ This is arguably due to lower land values, the higher level of market failure on the periphery, the influence of crofting and the existence of high levels of social capital in remote regions (LRRG, 2014).



asset/landholding; division and conflict in the community; and limited community capacity (Macleod et al., 2010; Skerratt, 2011; Mc Morran et al., 2018).

This contextual backdrop, geographical specificity, and the growing evidence of positive community outcomes has created a unique approach to land reform in Scotland. The focus is on the expansion of community ownership, as opposed to increasing public or private ownership, in ways that deliver benefits for communities, as is the case in many other countries (Bryden and Geisler, 2007).

Further forms of tenure in Scotland which are of relevance from a communal tenure perspective include common good land and common grazings. Although there is no statutory definition of common good property, it is understood to consist of heritable property (land and buildings) and moveable property (e.g. furniture, etc.) that previously belonged to the Burghs of Scotland (Wightman and Perman, 2005). Until the 19th century, all burgh property and revenue was deemed common good. Heritable property is the significantly larger component of Common Good Funds and mainly consists of public buildings, public spaces and, in some cases, farm land and other heritable property such as salmon fishings (LRRG, 2014). The combined value of common good property was considered to be over £300 million in 2012 (*ibid.*). Although this is less than 1% of the value of the property assets owned by Scotland's local authorities, the locations and character of the properties, and their local importance, has made them an important part of the community landscape in many places.

Common good land is land held for the common good of all residents of the burgh, with the land, held by feudal charter, intended to provide an income for the burgh (Callander, 1987). More recently, there have been several changes to how common good property is owned, due to local government reforms in Scotland since the Second World War, with common good property being transferred to district councils with the abolishment of town councils in 1947, and subsequently transferred to new district councils (1973) and local authorities (1993). Common good property remains an important legal entity and all common good property is owned by the local authority. Local authorities are constrained in how they administer this type of property and in how they are permitted to dispose of it (Ferguson, 2019). In 2014 the Land Reform Review Group recommended that major reforms should take place to improve Scotland's system relating to common good property, including a new Common Good Act to modernise Common Good law. The driver for this is the recognition of a need for a more direct link between common good land and the local communities where that land is located. As the LRRG (2014) report emphasised, under the current legislation, local authorities only have a legal duty to have regard to the interests of the inhabitants to which the common good related prior to the 1975 local government re-organisation.



The previously widespread ‘commonities’ have suffered a reduction in Scotland over time (Callander, 2003). Through various Commonalty Acts many of the common land areas outside of the Highlands and Royal Burghs were divided and appropriated by private interests. Additionally, some of the common lands within the towns and Royal Burghs of Scotland were appropriated by private landowners, leading to a considerable decline in the overall extent of common land in Scotland by the early 19th Century (Wightman et al., 2004).

The most significant remaining component of common land in Scotland comprises crofting common grazings. These areas, although predominantly privately owned, consist of communities of crofters with rights of use and occupation of the land (under the terms of the Crofters (Scotland) Act 1993 (as amended)). This secure system of tenure has led to the retention of communities in some of the remotest parts of Scotland and the survival of self-regulated common grazings on 7% of the land area (591,901ha) of Scotland. These areas are commonly found in more remote communities, including the North West coast, Shetland and the Outer Hebrides. The management of crofting common grazings, is governed by rules administered by local common grazings committees appointed by the rights holders, the function of which is to administer, manage and improve the grazings for (primarily) livestock production⁶.

3.2 Current policy context

Following the work of the Land Reform Policy Group in 1998, the first key step in the contemporary land reform process was the Abolition of Feudal Tenure etc. (Scotland) Act 2000. This removed the system of feudal tenure and the influence of feudal superiors in relation to land (LRRG, 2014). Following devolution and the re-establishment of the Scottish Parliament in 1999, momentum for land reform increased. The Community Land Unit was set up within Highlands and Islands Enterprise in 1997 to provide advice to existing and prospective community landowners, and the first Scottish Land Fund was established in 2001 (SLF 2001-2006), providing financial resources to communities to support land purchase. In 2003, the first Land Reform (Scotland) Act was enacted.

Part 2 of the 2003 Act introduced the Community Right to Buy (CRtB), giving eligible community bodies the right to register an interest in rural land and the opportunity to buy that land when it comes up for sale (see Box 1 for eligibility criteria). Uptake of the full CRtB measures has, however, been somewhat limited (Mulholland et al., 2015). Nevertheless, the 2003 Act is considered to have had additional indirect impacts by providing motivation for buyouts which occurred through negotiation without recourse to

⁶ There are currently 1072 crofting common grazings in Scotland and 463 active crofting common grazing committees (see:

http://www.crofting.scotland.gov.uk/userfiles/file/annual_report_and_accounts/crofting_statistics/Crofting-Statistics-2017-18.pdf



legislative measures. The Act has also facilitated a power shift away from private landowners towards communities (Slee et al., 2008; Macleod et al., 2010; Warren and McKee, 2011).

The Crofting Community Right to Buy (Part 3 of the 2003 Act) provided crofting communities with an absolute right to purchase land and other assets (i.e. a potentially forced sale). Although uptake has been limited, this has fundamentally shifted the balance of power between crofting communities and landowners (Macleod et al., 2010).

Box 1: Defining eligible community bodies under the Land Reform (Scotland) Act 2003

To be eligible to apply to register an interest in land under the CRtB legislation a community must form a community body, which must be either a:

- i) Company Limited by Guarantee (CLG);
- ii) Scottish Charitable Incorporated Organisation (SCIO); or
- iii) Community Benefit Society (CBS).

Community bodies must comply with the relevant sections of the Act and in particular be controlled by members of the community (with a requirement that 75% of the membership be residents of the defined community) and follow aims that are consistent with furthering the achievement of sustainable development. The community must also be defined geographically (as set out in Section 34(5) of the Act). Scottish Ministers must give written confirmation that the main purpose of the community body is consistent with furthering sustainable development before the community can apply to register an interest in land.

In 2014, the Land Reform Review Group presented their final report to Scottish Government, concluding that:

‘The relationship between the land and the people of Scotland is fundamental to the wellbeing, economic success, environmental sustainability and social justice of the country. The structure of landownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it’ (LRRG, 2014).

The Scottish Ministers responded to the recommendations of the LRRG with a number of initiatives, including the establishment of a working group to support the achievement of a target of a million acres of land in community ownership by 2020, the Land Reform (Scotland) Act 2016 and the Community Empowerment (Scotland) Act 2015. The 2015 Act introduced a right for community bodies (including those representing communities of interest) to make requests to all local authorities, Scottish Ministers and public bodies, for any land or buildings they feel they could make better use of, through ownership,



lease or other rights (this came into force in 2017⁷). Building on earlier processes which had been developed by some local authorities for transferring land and assets to communities, relevant bodies have established, or are establishing, various procedures to process 'Asset Transfer Requests'. Part 4 of the Community Empowerment (Scotland) Act 2015 also contains a series of amendments to the community right to buy, intended to improve and streamline the process. Additionally, the 2015 Act also provides new compulsory rights of purchase for communities by introducing a new Part 3A to the Land Reform (Scotland) Act 2003 – a Community Right to Buy Abandoned, Neglected or Detrimental Land.

The Land Reform (Scotland) Act 2016 included measures related to tenanted agricultural holdings, provision for the development of a Land Rights and Responsibilities Statement by the Scottish Government, the establishment of a Scottish Land Commission and the development of regulations on access to, and provision of, information about owners and controllers of land. These measures reflect an emphasis on increasing transparency and placing greater responsibility on landowners to manage their land sustainably and in the public interest. Additionally, the 2016 Act will provide a new compulsory right of purchase for communities: a Community Right to Buy Land to Further Sustainable Development.

3.3 International comparisons

Beyond Scotland, a dominant strategy during the 20th century was the removal of community-based tenure in the interests of progress (Wily, 2018a). This took place regardless of any dominant ideology and tended to occur either through "individualization and market-led concentration of ownership, or by the mass reconstruction of rural land use in state-run collectives on national lands" (Wily, 2018a, p. 2).

Despite this historical context, communal or municipal rights to land are relatively common globally and across much of Europe in comparison to Scotland, and there is growing statutory recognition (and acceptance) of rural communities as collective owners of land. For example, in a recent examination of the legal context of 100 countries, 73 were found to provide some form of legal provision for collective tenure by communities (Wily, 2018a).

In Scotland, community landownership is most commonly used to describe legal ownership of title by an organisation (i.e. a community body) that is neither private nor state run, which is therefore distinct from land owned by local authorities or other public

⁷ The Scottish Government has published guidance on asset transfer, including a Summary Guide to Asset Transfer: <https://beta.gov.scot/publications/asset-transfer-under-community-empowerment-scotland-act-2015-guidance-relevant-9781786527493/>



bodies. This is in contrast with some other countries, where state or ‘municipal’ ownership can incorporate significant community input to decision making and is an important aspect of community development.

In other contexts, the collective management of private properties as ‘commons’ (e.g. common grazings) represents a form of community-based asset management (Aiken et al., 2008). Communal tenure and ‘common land’ are relatively broad and widely used terms, encompassing a wide variety of legal and customary rights, contexts, scales and degrees of local community control. In many countries, indigenous groups have successfully retained or reclaimed a variety of ‘rights’ to land and resources, including in Latin America, Canada and Australia (Wily, 2018a). These indigenous ‘customary’ rights represent a form or subset of wider communal tenure, which are differentiated here due to their distinctness in relation to geographic context and in relation to their relative security of tenure.

Additionally, third sector organisations play an important role in delivering or co-delivering asset-based community initiatives in other countries (e.g. the United States). In particular, Community Land Trusts (CLTs) represent an established form of community ownership which has been adopted in a number of countries, following their emergence in the US in the 1970s.

There is therefore no all-encompassing definition of community ownership which can be applied at a global scale. Identifying and differentiating relevant forms of ownership is often confusing, although consideration of the axes of security of tenure and the degree of local community control provide a useful starting point for characterising different models to some extent (see [Section 8.1](#) for a visualisation of these axes relative to the main forms of tenure reviewed in this report). The following sections consider different types of community-based tenure in more detail.



4 Collective properties and commons

4.1 Definitions

There is no consensus around the definition of commons, communal property or any of the related concepts such as ‘common-pool resources’ and ‘common property’ (Xu and Clarke 2018, p.2). ‘The commons’ is often used interchangeably with ‘communal property’, and can be defined as ‘a diversity of resources or facilities as well as property institutions that involve some aspects of joint ownership or access’ (Dietz 2002, p. 18). The term ‘the commons’ is ambiguous between two types of meaning: the resource itself and the ways in which people utilise the resource. Its meaning also depends on the context (Xu and Allain 2015, 8).

In the context of ‘the digital commons’, for example, it usually refers to open access resources, or open access resource use; whereas in land and environmental discourse, it usually refers to limited access resources, or limited access resource use. The ambiguity of the term ‘the commons’ is manifested in Hardin’s analysis (1968), as he conflates two distinct categories of the commons (Xu and Allain 2015). ‘Communal property’ is understood as “a resource [...] owned or used by a group according to specific rules and regulations” (Margalit 2012, p.142). Xu and Allain (2015) argue that ‘communal property’ is a more useful concept than ‘the commons’, as it encompasses three important aspects: the resource which is used communally or collectively; the institution of governing the resource; and communal property rights or communal property holdings, when we refer to the rights held by the community.

However, in terms of the conception of communal property, this is also an area notorious for confusions in terminology and in concept. Xu and Clarke (2018, p.4) argue that “*as an essential first step we need to acknowledge the sometimes bewildering variety in the kinds of movements, institutions and resources which are currently described by reference to commons/communal property vocabulary*”. When modern scholars and activists use the term ‘commons’ or ‘communal property’, they are likely to have in mind one or more of (at least) six different things. They might be referring to:

1. *‘Community resource use*, where a resource is used communally by a group of people;
2. *Community management of resources*, where a community has overall control or management of an area of land (or some other resource system), with some of the resources within it being used individually by members, and others being used communally by the group as a whole, or by sub-groups within the community;
3. *Public open space* (e.g. greenspace or parks);
4. *Protest commons*, meaning local or public movements claiming back resources for public or community use or benefit;



5. *Common heritage resources*, meaning resources which are regarded as part of the common heritage of humankind, such as land, water, knowledge, or the internet; or
6. *Cultural resources*, meaning tangible or intangible resources of cultural importance to a particular community' (Xu and Clarke 2018, 4, italics original).

In some literature, the concept of 'communal tenure' is also used (e.g. Clarke 2009) which emphasises the importance of use and management of communal resources. This concept speaks to the UN-Habitat's (2008) definition of 'Land tenure' as "*the way land is held or owned by individuals and groups, or the set of relationships legally or customarily defined amongst people with respect to land. In other words, tenure reflects relationships between people and land directly, and between individuals and groups of people in their dealings in land.*" Communal property is relatively widespread globally, with the concept of 'the commons' also prevalent in some developed countries, including England, Spain, Norway and Japan (Berge and McKean 2015).

In England and Wales, there is no single definition of common land, but in general terms commons consist of areas where the rights of the legal owner are restricted and where other people (commoners) hold beneficial use rights over the land. Common land is recognised under the Commons Registration Act 1965, which attempted to have all common land recorded through the creation of a national register. However, many commons were not successfully recorded on the register and some commons became deregistered due to loopholes in the legislation. Today, the commons recorded on the register account for 8% of Wales and 3% of England. Commons are managed through Commons Councils. These are local level democratic structures with powers to regulate grazing and other agricultural activities, and improve the management of common land areas. Despite the existence of a number of related areas of regulation, common land areas have suffered from a lack of understanding of both exactly what common land entails and the public benefits linked with these systems. Increasing wider awareness of the existence and public values of the commons is key to these areas being valued and used sustainably long term (see [Annex 1](#) for more detail).

See Case Study in
[Annex 1](#): Common
land in England and
Wales

4.2 International examples

Compared to the concept of 'communal ownership', which may pose some challenges to protecting people who have no title to the land they cultivate other than use rights in many jurisdictions and contexts, the concept of 'communal property' or 'communal tenure' seems more advantageous (Xu and Gong, 2016). This is because it encompasses a variety of aspects that are important for sustainable development and



effective management of communal resources, including communal institutions, rights and relationships.

The concept of communal tenure is often used in relation to (but not restricted to) forests, rangelands/uplands, or comparable communal areas to be defined as communal property and these may be typically attached to a community member's farm, either as owner-occupier, freehold or similar tenure. These types of communal properties can be found in Spain, Portugal, Italy, Ireland, Sweden, Norway, Austria, Romania, Ukraine, Afghanistan, Kyrgyzstan, Mongolia, and Mauritania (Wily, 2018a).

In Italy, around 5% of the country is under communal property regimes. This can be considered as collective private tenure as it relates to the management of private properties by a group of people, but for the benefit of all, or where certain rights of access/use are retained by all (Aiken et al., 2008). Some 5% of Italy is thought to be under communal ownership, with these areas mainly owned by small groups of individuals (e.g. families) or the local residents of a hamlet (see [Annex 2](#) for more detail).

See Case Study in
[Annex 2](#): Communal
property regimes in
Italy

This type of arrangement is also found in Asia, Africa, and Latin America, whereby 'community land' refers to the entire domain of the community, including parcels set aside for the exclusive use of a family, individual or sub-community group under usufruct rights⁸. Where provided for, collective title covers both communally owned lands and parcels allocated for exclusive private use of community members (Wily, 2018a). Less often, and usually only in hunter-gatherer and pastoral communities, no part of the land area is allocated for solely private use (Wily, 2018a). [Section 7](#) of this report considers customary tenure and indigenous groups in more detail. Under the traditional ejido system in Mexico, community members can individually farm designated land parcels and collectively maintain communal holdings (Perramond, 2008).

The ejido system has similarities to the historic 'runrig' system in Scotland, a historic system of land tenure (which fell into decline by the early 19th century) particularly prevalent in the Highlands and islands, consisting of cultivable in-bye land divided into strips or 'rigs', which were periodically reassigned among the tenants of townships (to ensure the best areas of land were circulated across tenants) and larger areas of shared rough grazing land (Dodgshon, 1975).

Ejidos are plots of land granted by the government to communities through expropriation and distribution of larger estates and properties in the 1920s (Wolfe, 2017). Ejidos tend

⁸ Usufruct rights are effectively user rights, allowing the user to receive the benefits (use and fruits) of a property or other asset, without the right to dispose of, or substantially alter the nature of, the property or asset.



to encompass small plots of land owned by families, with a specific area designed as communal land, which is owned by everyone in the ejido. Before reforms to the Mexican Constitution in 1992, ejidos could not be sold, mortgaged, confiscated or transferred. Now, the sale and rental of ejido lands is legal – in an attempt to enhance tenure security through registering and titling land rights, and to improve the efficiency of rural land markets. This particularly tackles the challenge of illegal development of ejido lands in rural areas and in cities. The main crops on rural ejido lands are maize, sugar cane, coffee and grasslands for livestock. Some ejido communities are engaged with tourism activities, forestry, arts and crafts, fishing and payments for ecosystem services schemes related to carbon capture and biodiversity conservation. Ejido communities establish their own rules and are governed through an Ejido Assembly. Ejidos are very close to the municipal level of government, and can easily access and influence local politics and municipal decision makers, therefore playing a fundamental role in politics despite not being part of government itself (Varley, 1985; see [Annex 3](#) for more detail).

See Case Study in
[Annex 3](#): The Ejido
system in Mexico



5 Municipal ownership and management of land

5.1 Definitions

Municipal ownership is a form of state ownership, which can occur at different scales (i.e. regional/local authorities or local/municipal territories) and is relatively common across many European countries. Kaganova (2012) suggests a simple division of land or property between state and municipality, whereby the *“state retains only land or property explicitly needed for performance of state functions and state-owned enterprises and land with a special status such as national parks, while the rest becomes municipal property by default”* (p.2). Taking land into public ownership by municipalities supports *“planning efficiency, fiscal and social equity, and the delivery of services”* (Kivell and McKay, 1988, p.167; see also van der Krabben and Jacobs, 2013).

5.2 Municipal models and public interest

In the UK, the ownership of land by local authorities is an element of government land policy, alongside legal, taxation and other fiscal measures that influence private landownership and land use planning. Local authority involvement in landownership form and/or development is often a feature of urban planning in the UK, for example where strategic land acquisition, land assembly, and compulsory purchase powers are necessary to ensure local development (e.g. of housing and industry, as well as infrastructure and environmental projects; cf. Kivell and McKay, 1988; Home, 2009; Adams, 2013; van der Krabben and Jacobs, 2013). Similarly, in the Netherlands, local government public land development is a dominant feature of the delivery of planning goals, thus: *“to ensure that sufficient land would be available municipalities took up the task themselves”* (van der Krabben and Jacobs, 2013, p.776).

Indeed, the term ‘public ownership’ is arguably over-simplified, which challenges comparisons of municipal landownership internationally. As explained by Eidelman (2016), public or state-owned property, including that owned by municipalities, incorporates elements of both private and common property: *“the state, acting as an individual legal entity, exercises exclusive rights over a public good, enabling it to buy, sell, protect or dispose of property held in the public trust as if it were a private good”* (Eidelman, 2016, p.123). Gubareva et al. (2018) reiterate that municipal ownership is essentially dualistic in nature, combining features of both state and collective ownership, where local communities can exercise the legal powers of the owner (e.g. possession, use and disposal), however, the property title is not vested directly in communities, but in the State on their behalf.



Land held under municipal ownership is generally managed in the public interest⁹, with varying degrees of public input through elections, regulation or through direct participation in management processes (Caesar, 2016). For example, Wily (2018a) refers to Armenia, where local government is strongly aligned with community land governance, with the community electing a Council of Elders for five-year terms to serve as the governing body on all land and resource-related matters, with residents participating in decision-making through local referenda. The degree of local-level control (i.e. local democratic structures) in some European countries (relative to Scotland) provides a framework wherein ‘municipal ownership’ can deliver a high level of community input into decisions around land¹⁰.

In Norway for example where municipalities¹¹ are often significant local landowners, locally elected officials act on behalf of local residents to manage land to best meet local community interest (Fernández, 2008). The ‘State commons’ are owned by the state through the state forestry company (Statsskog) and managed by local (municipality-level) ‘mountain boards’, where board members are elected by the municipality council (with a majority of local residents required for board participation). Where commercial forestry production occurs on common land, a separate ‘commons board’ is established, again comprising elected local residents and representatives who have timber rights (Grimstad and Sevatdal, 2007). Common land in Norway may also be co-owned and managed by agricultural communities (community commons). Whilst the community commons are not connected to the municipalities in any way, they maintain a close dialogue, and they can be large landowners. The board of a community commons can effectively manage a large area (in some cases 50-90%) of a municipality (see [Annex 4](#) for more detail).

See Case Study in
[Annex 4](#): Municipal
ownership and
commonage in Norway

The ‘Access to Land’ initiative describes the example of the Grusse municipality in the French Jura that sought to overcome land fragmentation and land abandonment through recruiting small-scale private landowners to join a ‘collective ownership structure’, to create land-holdings of an economically-viable scale and support diversified farming activity¹². In this example, the private landowners entrusted their land to the collective

⁹ However, Kivell and McKay assert that since the 1960s, the ‘public interest’ has been weakened due to the multiplicity of interests that exist in modern urban society (1988: 166).

¹⁰ This is of particular relevance to the Scottish context following publication of guidance on ‘engaging communities in decisions relating to land’ by the Scottish Government (2018), and ongoing Local Democracy Review.

¹¹ Municipalities (‘kommuner’) are the lowest tier of government in Norway and total 428 across 18 counties (excluding Oslo).

¹² See: <https://www.accesstoland.eu/Grusse-municipality-collective-land-ownership-scheme>



ownership structure, in exchange for shares of an equivalent value; the collective ownership structure is managed directly by the municipality. Using the legal status of a communal Groupement Foncier Agricole (GFA; Agricultural Land Group), the landowners can acquire and manage land and buildings collectively¹³. The collective ownership structure has established new farm businesses and tenancies, supporting the local economy and social vitality. A distinguishing factor is that owners are required to involve other actors in the management of the land and the agricultural economy.

See Case Study in [Annex 5](#): Municipal management of collective ownership structures in France

Forest ownership is a feature of municipal or local authority landownership across Europe (and internationally), as represented by the European Federation of Municipal and Local Community Forests (FECOF), who adhere to the European Municipal Woodland Charter (FECOF, 1992). However, again there exists complexity regarding property rights and governance mechanisms between forests under 'community' or 'municipal' ownership. For example, as described:

"Public forest ownership is very diverse and, among other types, includes communal forest ownership. The communal, sometimes also called municipal, form of ownership is characterized by significant impact of forest management on the welfare of local communities, both urban and rural. Therefore, it requires proper recognition among other ownership types" (Hauck/FECOF, 2018).

This definitional challenge is confirmed by the COST Action FP1201 FACESMAP project (Forest Land Ownership Change in Europe: Significance for Management and Policy), which found international comparison limited by the fact that in some countries, municipal forest ownership is considered private ownership, and in other countries it is classified as public. For the purposes of this report, it is important to consider the governance mechanisms associated with municipal forest ownership, and to what extent this is devolved to local levels.

See Case Study in [Annex 6](#): Common property regimes in Europe's forests

In 2012, forest land in France was predominantly under private ownership, with 10% under state ownership and 15% owned by municipalities. Within the structures of public sector forests, the opportunity arises for local communities to participate in forest land management. The municipal council is elected by local inhabitants; subsequently the municipal council finalises the forest plan, with the technical forest plans created by the forest officer. The Forest Law in 2001 introduced the Charter for Forest Territory (CFT)

¹³ https://www.agter.org/bdf/fr/corpus_chemin/fiche-chemin-139.html



– a tool created to embed people into decision-making and to discuss forest management at the local/landscape scale. Through the Charter, all local inhabitants and stakeholders are invited to discuss public forest management, seeking to agree a document, recommendations and/or actions, for example, to improve recreation in the forest, create new forest roads, etc. The CFT is considered by key informants as a ‘good tool of governance’, involving active participation of many French forestry/community organisations, and therefore supporting democratic forest ownership. In reality, however, the main stakeholders who participate in discussions continue to be technical actors, and not citizens (see [Annex 5](#) for more detail).

5.3 Municipal commonage

Municipal ‘commonage’ is distinct from municipal landownership and explained in the literature with examples from South Africa. As described:

“The term municipal commonage is traditionally given to land, owned by a municipality or local authority that was usually acquired through state grants or from the church. It differs from other municipally owned land in that residents have acquired grazing rights on the land, or the land was granted expressly to benefit needy local inhabitants. Municipal commonage is not the same as communally owned land held in trust by the state and usually occupied and administered by tribal authorities” (Land Reform Policy Committee, 1997, p.1).

Municipal commonage provides an opportunity to reallocate land to landless people and for local economic development. Indeed, the South African president Cyril Ramaphosa has called for municipalities and state-owned enterprises to release unused land for housing development, and to avoid illegal land occupation (Presence, 2018). Presently, two broad categories of ‘commonages’ may be distinguished in South Africa: commonages before 1994 and commonages after 1994 when the new political dispensation commenced. The former category comprises ‘old’, ‘existing’ and ‘traditional’ commonages, which consist of ‘land found adjacent to small towns that was granted by the state (mainly in the 1800s during the formal establishment of towns) for the use and benefit of the residents’. Commonage land was intended for use by the inhabitants of a particular town for grazing or other agricultural purposes. Post-1994 commonages relate to ‘new’ commonages, which consist of land purchased by the former Department of Land Affairs, to either create a new commonage or expand an existing commonage, as part of a national land redistribution programme. Access to commonage is essentially use rights and the land must be used in the “*public interest or if the plight of the poor demands it*” (Mostert et al. 2010 p.57). Although vast tracts of land are still in municipal control and in theory

See Case Study in
[Annex 7](#): Communal
land tenure and
municipal
commonages in South
Africa



available for redistribution purposes, much of the land is tied in long-term leases to the benefit of established commercial farmers (see [Annex 7](#) for more detail).

5.4 Delivering local services

Municipal landownership is often utilised as a mechanism for delivering key local services or maintaining community facilities, reflecting a wider shift towards devolution of power to community levels (cf. McShane, 2006). In Sweden for example, municipal ownership has been a key aspect in the delivery of social housing, although this sector has faced increasing pressure in recent years to increase rents and segment housing stock into social and mainstream housing, due to a harsher economic climate (Turner, 2007; Caesar, 2016). Interestingly, Aiken et al. (2008) argue that, due to an established history of successful joint-working between communities and the state in Sweden, a state–citizen relationship has been fostered which is “*more co-determining than confrontational in policy and implementation issues*” (2008, p.33), negating the requirement for outright community ownership where there is sufficient negotiated access to facilitates and services.

Notably, the ownership of land and property by municipalities raises concerns regarding inefficiencies (e.g. created by market shifts, land surpluses and land banking), as well as interventions in the land market, where the municipality is better placed to make investments as they have an ‘inside track’ of land use planning. Adams et al. (2001) found that local authorities are often reluctant to sell land, and instead tend to restrict disposals to long leases, which can create barriers to community-land based activities (see Roberts and McKee, 2015).

In Germany, there has been growing concern about the need to change how public land is owned and administered, particularly in the current context of high demand for land and affordable housing in urban areas. Municipalities in Germany’s towns and cities adopt a range of policies relating to the ownership and management of public land, several of which have received considerable public and political attention. For example, in Hamburg and Frankfurt, the municipalities have attempted to empower communities to buy public land. When land or building(s) become available, individuals are invited to form groups and submit a ‘concept’ to the municipality. This must demonstrate their financial ability to buy and manage the land/building(s) collectively and they must also demonstrate the social impact of the proposed project. Other smaller towns have adopted a planning-based approach to administering public land whereby the municipality purchases land and assigns appropriate planning permission(s) (Scheller, 2018). With this approach, the municipality controls development via the planning permission process and its ‘interim’

See Case Study in
[Annex 8](#): Municipal
landownership and
administration in
Germany



ownership to ensure control over social housing and limit the amount of housing sold at or above market value (see [Annex 8](#) for more detail).

Wily (2018a) also notes that as the state retains legal title in most municipal forms of ownership, the potential exists for the state to make decisions which may not always be in the best interests of the community. This highlights the importance of agreed and substantive mechanisms for community input to decision making. Furthermore, Rønningnen and Flemsæter (2016) highlight a lack of willingness by state institutions to implement land use guidelines (which may be unpopular) in development projects, instead deferring this responsibility to local authorities. This raises concerns regarding the interaction and power relations between local, regional and national authorities, when facing large-scale land developments, and the power of local autonomy and governance in national democratic processes (Rønningnen and Flemsæter, 2016).

Landownership by municipalities (i.e. as a tier of public landownership) illustrates ideological divides regarding land rights and responsibilities, as described:

“On the one side are those who advocate public ownership of land for broad political and social reasons connected with notions of power, collective ownership and equity, and on the other side are those who defend private property, individual rights and the operation of the free market” (Kivell and McKay, 1988, pp.167-168)

Furthermore, assumptions that publicly-owned land is held collectively, is accessible, and owned for community benefit are also critiqued by several commentators, such as Eidelman (2016), who highlights the range of land uses on public land and assets owned by state-owned enterprises. In practice, this complicates establishing definitions and dividing lines between public, community, and communal ownership. The mechanisms of community involvement in decision making can vary considerably and are central to the degree to which public or municipal ownership reflects collective tenure.



6 Third sector models and the evolution of Community Land Trusts

6.1 Definitions

Ownership of land and/or assets by third sector/non-profit organisations, where the primary aim is community benefit, is also relatively common in many countries. The charitable/non-profit organisation retains legal ownership of the land/assets, which are held on behalf of the community, often with the aim of providing a specific service (e.g. affordable housing) (Aitken, 2012). These organisations may be relatively informal (e.g. volunteer led) or larger professionalised charities, and generally incorporate significant elements of democracy and participation.

Aiken et al. (2008) explain that the range of institutions that own and manage land in the United States include public, private and non-profit sectors, and all can have an involvement with asset based initiatives for communities (e.g. housing, regeneration, or employment initiatives). Local authorities in the US often transfer land and property to non-profit corporations, which in turn provide local tax revenues through regenerative community-led initiatives.

More generally, asset-based community development (ABCD) approaches have been increasingly pioneered in the US (and more widely) in recent decades, emphasizing the importance of utilising a range of assets, beyond land and buildings, to build on communities' existing strengths and generate an upward spiral of positive community development (Kretzmann and McKnight, 1993). ABCD approaches are commonly led by third sector development bodies, often in the form of Community Anchor Organisations (CAOs) partly due to the ability of these organisations to access funding which public sector bodies do not have access to (Crowe et al. 2011).

As Crowe et al. (2011) note, there is no single correct 'vehicle' for ABCD and community anchor organisations can vary in terms of their legal form¹⁴ (e.g. Company Limited by Guarantee, Community Interest Company, Charitable Incorporated Organisation etc.) and their levels of stakeholder involvement. These bodies are often referred to as development trusts and/or community land trusts (CLTs), with these terms sometimes used interchangeably and in relation to organisations of very different scales, operating

¹⁴In relation to CLTs in the UK the main legal forms used are Community Interest Companies (CICs), Companies Limited by Guarantee (CLG) and Community Benefit Societies (CBS). See <http://www.communitylandtrusts.org.uk/filecache/3d8/4e6/196-introduction-to-legal-formats-for-website.pdf>



in both rural and urban contexts, with a variety of legal structures and differing focal activities.

6.2 Community Land Trusts internationally

As Moore and McKee (2012) note, CLTs are internationally predominantly focused on the development of affordable housing and other civic/commercial spaces (as opposed to the wider community development focus of many development trusts in Scotland¹⁵) in disadvantaged communities, with the aim of overcoming social exclusion and the negative effects of gentrification, property speculation and rising land values¹⁶. This entails the CLT acquiring land/property, developing affordable housing and owning it in perpetuity for the benefit of the community (Diacon, 2005).

CLTs commonly take an approach to property development which incorporates restrictions on housing values to limit equity gain for the individual owner and ensure housing remains affordable permanently regardless of fluctuations in the property market, limiting individual profitability but increasing local market stability (Ciardullo, 2012). The development and application of the modern CLT model has its origins in the US, where it has been developed at a variety of scales to successfully deliver affordable housing. CLTs in the US can vary in terms of their legal structure, scale of operation (e.g. neighbourhood, city, county, multi-county, state), the focus of their activities and their degree of reliance on state or federal assistance (Meehan, 2014). Nevertheless, most CLTs share a number of characteristics, commonly including an open membership (from within their geographically defined community area). The 'classic' CLT follows a tripartite board structure, with representatives of the defined community area making up a third of the board, representatives of residents of CLT housing a third, with the final third made up of wider relevant public and wider stakeholder body representatives. Critically, CLTs have both a housing provisioning function and, due to their nature as community bodies, an organising and empowering function for communities – both of which are of key importance (see [Annex 9](#) for more detail).

See Case Study in
[Annex 9](#): Community
Land Trusts in the
United States

The potential of CLTs for delivering affordable home ownership (and rental properties), building social capital and empowering communities, as demonstrated through early CLTs in the US, has led to the model being used in a range of countries around the

¹⁵ The Development Trusts Association (DTAS) define a development trust as: “a community-owned and led organisation, working to combine community-led action with an enterprising approach to address and tackle local needs and issues” with the aim of creating “social, economic and environmental renewal in a defined geographical area, creating wealth within that area and keeping it there”.

¹⁶ See for example: <http://cltnetwork.org/>



world, including Canada, Belgium and other parts of Europe, Australia, parts of South America, Kenya and the UK (Ciardullo, 2012).

6.3 Community Land Trusts in the UK

The increasing adoption of the CLT model in England in the last 10-15 years reflects the UK Government's localism agenda¹⁷ and an increasing emphasis on transferring assets to communities and delivery of services through partnership with third sector/community based organisations (Moore and McKee, 2012). CLTs in England have since been defined in the Housing and Regeneration Act¹⁸ (2008) as a corporate body which *"is established for the express purpose of furthering the social, economic and environmental interests of a local community by acquiring and managing land and other assets"*. The UK Community Land Trust Network, in their CLT Handbook¹⁹, have further defined five key criteria for CLTs:

- **Community-controlled and community-owned:** A CLT is set up by the community and for the community. The members of the CLT will control it and the assets can only be sold or developed in a manner which benefits the local community. If the CLT decides to sell a home, the cash realised is protected by an asset lock and is re-invested into something else that the trust's members think will benefit the local community.
- **Open democratic structure:** People who live and work in the defined local community, including occupiers of the properties that the CLT owns, must have the opportunity to become members of the CLT. The CLT should actively engage members of the community in its work and ensure that they remain engaged in the development and operation of the CLT.
- **Permanently affordable housing or other assets:** This is a crucial defining feature of a CLT. A CLT will endeavour to keep the homes or assets permanently affordable. This means that the home or asset is not just made affordable for the first buyer but that the CLT maintains the affordability of the housing or asset in perpetuity.
- **Not-for-profit:** All CLTs are not-for-profit and any profits generated by the CLT cannot be paid by way of dividend or otherwise to its members but must be used to further the community's interests.

¹⁷Including the Localism Act (2011) <http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted> which also introduced additional rights for communities, including the Community Right to Build, Community Right to Bid and the Community Right to Challenge.

¹⁸ Housing and Regeneration Act (2008) Part 2, Chapter 1, Clause 79: (which also further defines the key features of CLTs which reflect the criteria outlined in the CLT Handbook (see above):

<https://www.legislation.gov.uk/ukpga/2008/17/contents>

¹⁹ <https://www.carnegieuktrust.org.uk/publications/community-land-trust-handbook/>



- **Long-term stewardship:** A CLT does not disappear when a home is sold or let but has a long-term role in stewarding the homes. In some cases, they will remain the landlord of the rental homes or will retain an element of unsold equity in the homes.

Local control therefore remains a fundamental aspect of CLTs in the UK. Nevertheless, as Crowe et al. (2011) note, CLTs in the UK (similarly to the US) include both locally-driven grassroots initiatives and state-funded partnerships between communities, NGOs and regional government and the degree of local control can vary. In some cases, CLTs have been established in England with a small, dedicated group of volunteers and stakeholder body representatives, with a view to evolving towards a wider level of community engagement and empowerment as the organisation progresses (Moore and McKee, 2012).

Reflecting developments in the US, an emerging structural format in England consists of professionalised sub-regional or ‘umbrella’ CLTs²⁰, which provide volunteer support, assistance with funders and ensure organisational fairness and transparency for a wider network of more localised CLTs. These initiatives and approaches evidence the potential for two-tiered structures, with differing levels of local community control and involvement, while also highlighting the importance of considering how the relationships of CLTs to wider structures (and funders) can shape their approach and the potential of local democracy (Moore and McKee, 2012).

Relative to CLTs in the US, CLTs in the UK are often operating at smaller scales and in smaller settlements (with the exception of a small number in larger urban areas including London and Bristol). The majority of CLTs in England are also predominantly focused on homeownership, as opposed to an increasing focus on rental housing by CLTs in the US. CLTs in England also appear to have placed a greater emphasis on diversifying their activities and portfolios (e.g. to include community centres, community shops etc.), while CLTs in the US have remained predominantly focused on housing provision and upscaling their operations. Critically, differences in the underlying legal frameworks governing land have made the separation of ownership of the land and ownership of the housing on the land a greater challenge in the UK, relative to the US, where this has been more easily achieved²¹.

CLTs can also be used effectively to protect ‘indigenous’ communities from gentrification and absentee landlordism, with some CLTs in England assigning housing according to the ability of residents to demonstrate a familial or employment related connection to the

²⁰ See for example Cornwall CLT (www.cornwallclt.org) and Lincolnshire CLT (www.lctt.co.uk) both of which act as umbrella structures at a regional level for wider networks of more localised CLTs.

²¹ The comparative points relating to CLTs in the US and in England are drawn from discussions with key informants: John Emmeus Davis (Burlington Associates) and Thomas Moore (Liverpool University).



area, with similar approaches being employed in CLTs in Scotland (Moore and McKee, 2012; Mackenzie, 2012). While some CLTs have been criticised in relation to the potential for excluding 'non-indigenous' people, these efforts highlight the possibility for CLTs to target the provision of housing for people of working age and/or with young families, to address existing demographic imbalances (Moore and McKee, 2012).

Additionally, these aspects highlight the potential for application of the CLT model in developing countries, in ways which protect indigenous and established communities, such as for example in Sub-Saharan Africa and slum areas of major cities in the global south. However, implementing the CLT model in new contexts may prove challenging - as Bassett (2005) evidenced in relation to the attempted application of the CLT model in Kenya, the legal complexity of the model, weak government support and existing division relating to allocation of land rights, meant the approach was unable to achieve its core goals. Additional key future considerations for CLTs include balancing the potential of partnerships with public and private bodies with maintaining local control, developing new funding models (e.g. community shares, taxation approaches etc.) and balancing demands for rental housing against demand for homeownership.



7 Customary tenure and indigenous groups

7.1 Definitions

Many governments and international organisations now recognise the social, economic and environmental benefits of communal tenure, with a particular interest in the benefits experienced by indigenous communities (Anderson, 2011). Separated out here as a sub-category of communal or common ownership ([Section 4](#)), customary tenure relates to communal land that is owned/managed by indigenous people/groups. A common characteristic of indigenous people is the centrality of their connection to their land and natural surroundings, which provides for social identification and for spiritual and cultural distinctiveness (Anderson, 2011).

The norms of customary tenure derive from, and are sustained by, the community itself rather than the state or state law. Although the rules which a particular local community follows are known as customary law, they are rarely binding beyond that community, as found in relation to land parcels allocated to individual families from communal lands in Vanuatu and Fiji, for example, as well as many East African countries (Wily, 2018a). This type of tenure may also relate to interests in/rights over the management of certain aspects of the natural resource, e.g. grazing, fishing, timber rights, which may be held separately from legal ownership rights (Aiken et al., 2008). These rights can be considered community assets that play an important role in community development and growth, with negative consequences arising when access to these assets is denied (ibid.).

7.2 Protecting customary rights

The 1992 Earth Summit in Rio de Janeiro led to increased global commitment to recognise rights held by 'indigenous peoples' (Rights and Resources Initiative, 2012). The adoption of the UN Guidelines on Responsible Governance of Tenure in 2012 also signalled a growing acknowledgement of the values (extrinsic and intrinsic) of land and other assets to indigenous peoples and other communities with customary tenure systems²². The UN Guidelines pay particular attention to the recognition of legitimate tenure rights to ancestral lands. Other relevant obligations and voluntary commitments exist in the International Labour Organisation Convention (No.169) concerning Indigenous and Tribal Peoples in Independent Countries, the Convention on Biological Diversity, and the UN Declaration on the Rights of Indigenous Peoples. It is, however, important to note that the legal focus on indigenous peoples is widening, with the majority of land laws in force today not distinguishing categories of rural communities (Wily, 2018a).

²² Part 3, Section 9 of the Guidelines.



7.3 International examples

Two models of tenure which can be adopted by indigenous peoples are commonly described in the literature (e.g. Anderson, 2011; Pienaar, 2008). First, the ‘permanent title’ model, whereby the state fully hands the land over to indigenous communities for private collective ownership. In this model, states have formally recognised that indigenous communities have specific rights which strengthen the security of their claims to land. Second, the ‘delegated management’ model occurs where the state maintains ownership of the resources and delegates management to local groups, often for a specific period of time. This second model is far more common among indigenous communities. Rights-holders have partial right of tenure but may lack the full legal means to secure their claims to the land.

Examples of customary tenure can be found on a worldwide scale, most expansively in agrarian economies. However, examples exist in industrial economies, such as rural commons in Spain, Portugal, Italy and Switzerland, and territories belonging to indigenous minorities in Europe, North America and Oceania (Wily, 2011). Customary tenure is vibrantly active and forms the major tenure regime in rural Africa (Wily, 2011). Community forest tenure regimes for indigenous peoples are also widely recognised in Latin America (Rights and Resources Initiative, 2012).

Many indigenous communities remain uncertain about the security of their land rights, with legal protection of community land rights varying from one country to another (Wily, 2018a; Nkuintchua, 2016). Without secured tenure, investors will not commit to investments that support economic development. For some indigenous groups, *“the right to have control over land or other resources, such as fishing, might [therefore] be connected to a more radical agenda of self-determination”* (Aiken et al., 2008, p. 35). In Bolivian land law, communal land owners are defined as ‘original, intercultural, or peasant communities’ (Wily, 2018a) and they are collectively entitled to communal properties and ex-haciendas for subsistence purposes. Bolivian peasant communities organised in Location-based Social Associations (ASLs) can also lease their rights to other, similar associations.

Kenya has acknowledged customary tenure as lawful and not merely rights of occupation or use as in the ‘delegated management’ model outlined above. The Community Land Act (2016) focused on how to bring community lands under formal Community Title (by documenting and mapping existing forms of communal tenure and ensuring they are governed by communities). This provides a framework through which customary holdings can be identified and registered, and this promises land security for six to ten million rural Kenyans. Provision for (and registration of) community title presents a way to clarify community property that

See Case Study in [Annex 10](#): Provision of collective title in Kenya



already existed via customary rights. Community title is also directly vested in communities once they register their existence – there is no need for them to create corporate entities – and they may define their memberships and make land rules with binding legal force (Wily, 2018b). However, there are some legal loopholes which place communities at risk of their lands not being as secure as was promised before the new legislation. This is mainly as a result of weak political will to apply the law and overlapping claims to land by the national and local government authorities over communities. In such cases, the assistance of non-state actors and participatory mechanisms to ensure effective allocation of community rights are required (see [Annex 10](#) for more detail).

The law on communal lands held by the Sámi people in Norway's Finnmark region is also related to their status as an indigenous community (Wily, 2018a). In Finnmark (the northern most region of the country), the Finnmark Act (2005) abolished the 'state lands doctrine' and transferred about 95% of the area of the county to the inhabitants. The Finnmark Estate (consisting of 45,000km² of outlying fields and mountainous areas) is owned collectively by all residents of Finnmark County and governed by a Board of six directors, appointed by the Sámi Parliament and Finnmark County Council (Riseth, 2015). The Finnmark Commission was established to identify individual and collective ownership and possession rights, although after a decade of work there are still no 'real collective rights' and what remains is still 'state commons'. There is the sentiment that there has been no real change since the era of state ownership of Finnmark land: there has been little influence of local people on local management and local people have still not been awarded rights beyond what it directly prescribed by the law (Ravna and Bankes, 2017). There are also concerns that Sámi people have not been well-represented in recent decisions and appeals relating to landownership rights (see [Annex 11](#) for more detail).

See Case Study in [Annex 11](#): Indigenous ownership and management rights in Norway

In Canada and South Africa, communal land tenure has highlighted the importance of: (i) embedding land rights in social relationships; (ii) understanding land rights as inclusive (shared) rather than exclusive; and (iii) understanding access to land as guaranteed by social norms and values, distinct from control by authorities and/or administration (Poisson, 2015; Pienaar, 2008).

See Case Study in [Annex 12](#): Indigenous partnerships in Alberta, Canada



8 Synthesis and lessons for Scotland

This review has differentiated four relevant forms of tenure/ownership: i) communal or common tenure; ii) municipal landownership; iii) control and management of land by third sector community bodies (particularly Community Land Trusts); and (iv) customary tenure by indigenous peoples. There is considerable overlap between these tenure formats, with customary tenure largely a subset of communal tenure/common land, and ‘delegated management’ models of customary tenure also reflective of municipal ownership examples where there is a formalised level of community control.

A similar set of underlying drivers and narratives for landownership change are often apparent across a diverse range of contexts, including an emphasis on privatisation of land with a view to increasing profitability and productivity of rural areas and agriculture. Despite this, as evidenced from the case studies carried out for this work and wider evidence on community/communal landownership outcomes (see [Section 3.1](#)), non-private systems of tenure can deliver a very wide range of socio-economic outcomes. Indeed, despite placing an emphasis on addressing the impacts of concentrated patterns of private landownership, the Scottish Land Commission’s first strategic objective is productivity – with a specific focus on ‘driving increased economic, social and cultural value from land, drawing on the International Covenant on Economic, Social and Cultural Rights’²³.

Communal systems of landownership or stewardship often have a strong rural dimension, linked to the potential benefit of combining small-scale farming with a sharing of resources (e.g. grazing rights) across a larger pool (see the case studies about [England and Wales](#), [Italy](#) and [Mexico](#), for example). Nevertheless, as highlighted by some webinar participants (see [Annex 14](#)) in relation to communal and community ownership generally, an increasing shift towards urban areas is apparent (as is the case in [Germany](#) and the [USA](#)). This is in response to declines in public services, a continuing rise in land and property values, and an increasing need for alternative systems to address market failures relating to community development in towns and cities. This also reflects the current situation in Scotland.

8.1 Security of tenure and land rights in different systems

The relative security of tenure and the degree of local control represent two key ‘axes’ for all forms of communal/community tenure and ownership (as plotted visually in Figure 8.1). These two axes guided the narrative in this report and informed the selection of case studies.

²³ See the Scottish Land Commission Strategic Plan 2018-2021: <https://landcommission.gov.scot/strategic-plan/>

Figure 8.1: Tenure types plotted against security of tenure and degree of local control

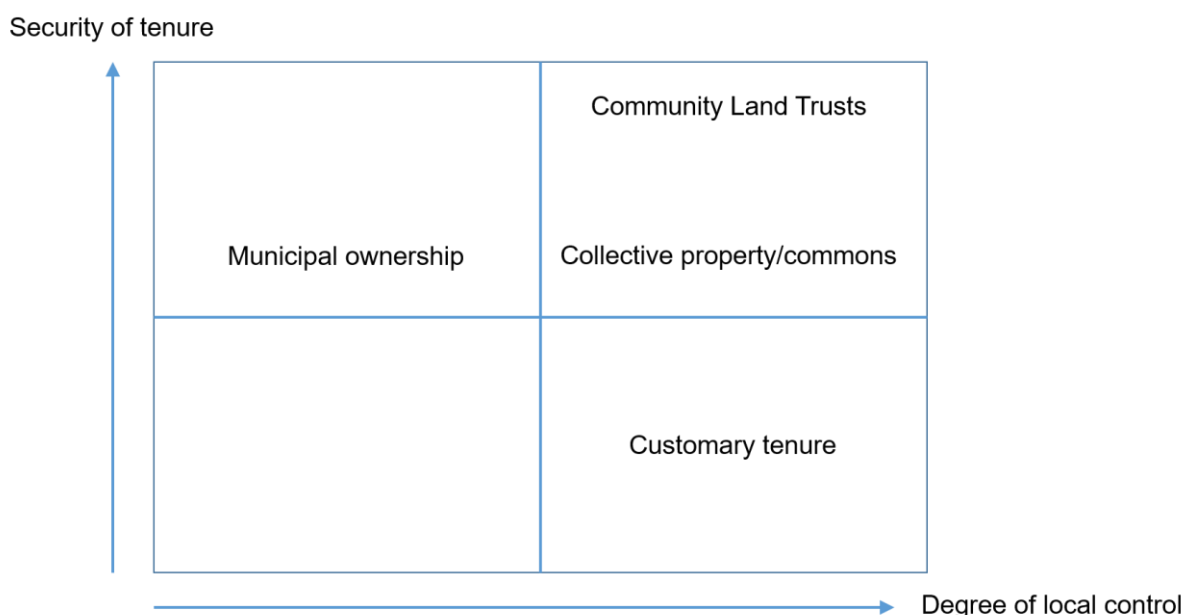


Table 8.1 shows how security of tenure was found to vary in practice (using red shading to show low security of tenure/local control, green showing high security of tenure/local control and yellow shading showing variable levels of security of tenure/local control). In general, customary tenure is associated with insecurity in relation to legal title for communities (beyond customary law) in many cases. The security of tenure for communities within customary tenure systems can be enhanced; however, this may result in the loss of some communal rights (in favour of individual titles) and re-working customary systems to facilitate this can be very challenging in practice. Municipal/shared ownership models and third sector models such as Community Land Trusts were found to deliver higher levels of security of tenure.

Legal ownership (of title) alone is often not the defining characteristic of what can be communal or community ownership at a global level. Bundles of rights (e.g. rights over resources – fishing, timber, grazing etc. as well as responsibilities for management) and/or strong local governance structures can result in a community-led approach to land management and decision-making related to land and/or related resources, despite the outright ownership of the land lying with another body. This can occur in a variety of formats, with some key examples of separation of land title from land rights and responsibilities evident in the case studies summarised in Table 8.2, with much of the related underpinning legislation summarised in Table 8.3.

Table 8.1: Tenure types considered in this report with links to case studies and showing relevant level of security of tenure



Form of Tenure	Definition	Key aspects	Level of security (of tenure)	Degree of local community control	Scale/type of land	Examples/relevant cases
Collective property/commons	Broad set of related terminologies. Communal property: owned or used by a group according to specific rules and regulations.	Relates to: the resource which is used communally or collectively; the institution governing the resource; and communal property rights or communal property holdings.	Variable, very broad range of arrangements.	As above, may be high degree of local control. May be constrained by long term agreements/roles and regulations (in terms of change).	Very wide range of movements, institutions and resources relevant to this category. Rural and urban aspects.	Key: Mexico (communal forests, communal agriculture (Ejidos), Japan (forest commons), England (commons) Other examples (widespread): Sub-Saharan Africa, Norway, Italy , Latin America, Asia.
Municipal ownership	A form of state ownership of land occurring at different scales (i.e. regional/local authorities or local/municipal territories).	Combining features of state and collective ownership; with communities often exercising owner powers (e.g. developmental decisions) but with title held by the state.	Potentially high level of long term security, but legal title not held by the community. Community potentially vulnerable to policy shifts.	Variable, although many municipal ownership formats exhibit a high level of community input to decision making.	Variable scale can include forests, agricultural lands, urban areas and housing.	Key: Norway (municipalities and State commons); France (Access to Land initiative); South Africa (municipal commonage); Municipal ownership and housing, Sweden. Other examples: Germany , Netherlands, Armenia, Austria and Portugal (municipal forests)
Third sector/Community Land Trusts	Community controlled non-profit organisation which owns and manages land and other assets in perpetuity for social, economic and environmental interests of a local community.	CLTs generally follow and open democratic structure. Organisational board commonly includes relevant community, representatives of homeowners and stakeholders.	A high level of security of tenure for communities in perpetuity.	Generally high level of community control but variable at larger scales and where CLT establishment has been led by the state/wider stakeholders.	Variable from highly localised (often rural) initiatives engaged in holistic community development to larger scale, sectoral (often urban) CLTs focused on affordable housing.	Key: USA , England, Wales, Scotland Other examples: Australia, Canada, parts of South America, Belgium
Customary tenure/indigenous rights	Sub-category of communal property. Land or resources owned and/or managed by indigenous groups. May also relate to specific resource rights (e.g. fishing, grazing, timber).	i) Understanding access to resources as guaranteed by community social norms and values; ii) embedding land rights in social relationships; ii) understanding land rights as inclusive rather than exclusive.	Often low level of security (quasi-legal), with customary laws not binding beyond community or 'delegated management'. Some examples of legal titling which can be important for securing land rights.	Often a high degree of localised control over specific land rights. Dependent on sufficient degree of local organisation. Long term security/control less certain in many cases.	Commonly linked with agrarian and/or subsistence economies (e.g. grazing. Fishing rights etc.), often rural context.	Key: Sub-Saharan Africa (e.g. Kenya), Canada, South/Central America. Industrial economy examples in Europe (e.g. Sami, Norway) Other examples: Community forest regimes for indigenous peoples in Latin America. North America, Oceania.



Table 8.2 Specific examples of the separation of land title from land rights and responsibilities evident from the case studies

Country	Tenure System	Mechanism of separation of legal title from user rights and responsibilities
Norway	<i>Municipal State Commons</i>	The State-owned forestry company is the legal owner of the 'state commons' and undertakes timber production on the common land. Additional user rights, including grazing rights, and the use of timber for farm buildings, fencing, and firewood, are transferred to local farmers.
France	<i>Municipal Forests</i>	Considered as collective private property, ownership is held by communes, with the town councillors (i.e. commune) deciding on management plans/priorities. Responsibility for forest management is delegated to the ' <i>the Office national des forêts</i> (ONF) who implement the management plan.
United States	<i>Community Land Trusts</i>	CLTs use a long-term ground lease model to retain ownership of the land and ensure the housing remains permanently affordable. Homeowners buy and own their home (but not the underlying land, which they lease) and are required to agree to resale price restrictions to maintain the affordability of the homes and the CLT commonly retains a long-term option to repurchase the homes at a formula driven price.
Europe	<i>Common Property Regimes (CPRs) in Forest Ownership</i>	Numerous examples of CPRs in European forests, in which the ownership may lie with the state or the community, with management responsibilities shared between the two. Portugal provides an example where communal forests are owned by local communities and can be managed directly by the community ownership body, or co-managed with local state agencies.
South Africa	<i>Municipal/ state commonages</i>	Includes older commonages adjacent to small towns where the land is held by the state and user rights have been granted (1800s) to local residents for their benefit. Post-1994 'new' commonages consist of land purchased by the Department of Rural Development and Land Reform to create a new or expand an existing commonage.
Norway	<i>Finnmark Estate</i>	Grazing rights across large, unfenced areas remain crucial (and more important than legal ownership) for animal husbandry (especially sheep and reindeer herding). Norwegian Sámi people hold land use rights but not fixed legal property ownership.

Critically, customary tenure arrangements (despite their often weak legal basis) may represent key aspects of community development and self-determination. These cultural and identity related aspects of many communal tenure systems can facilitate further beneficial outcomes in terms of livelihoods/community retention and the long-term sustainability of these areas - highlighting the potential vulnerability of some indigenous communities to changes in tenure arrangements linked to external factors. Nevertheless, in situations where both legal title and control over decision making processes lie with the localised community (e.g. a locally embedded, bottom-up



Community Land Trust), the strongest forms of community ownership and management have the potential to exist and develop.

In municipal ownership systems (e.g. municipal state commons in [Norway](#)) a clear separation can exist from the municipality or state as legal owner, and the collective agricultural community, who retain a number of specific use rights. In contrast, other municipal systems (e.g. municipal forests in [France](#)) facilitate the legal title (and some of the use benefits) being held by the municipality, with the responsibilities for management being retained by the state through a state forestry company. Critically, in some cases of extensive land management in customary tenure systems (e.g. reindeer herding in [Norway](#)), user rights are often of greater significance for livelihoods than outright legal ownership, which is retained by the state or transferred to a collective governance entity such as the Finnmark Estate in the [Norway](#) example.

8.2 The role of policy and legislative mechanisms in international contexts and their relevance to Scotland

The case studies illustrate the role of policy and legislative mechanisms in establishing and protecting communal and community land systems internationally, with a cross section of legislative mechanisms from the case studies presented in Table 8.3²⁴. In some cases, it was apparent that a lack of underlying coherent legislation (e.g. as may be considered the situation in [Italy](#) and more widely with respect to indigenous tenure) weakened the basis for communal claims to land. This can result in greater privatisation and loss of communal rights over time, and in some cases existing vested interests can constrain further development of municipal commonages (e.g. long-term farm leases in [South Africa](#)). Legislation has not always been the key driver for the establishment of specific tenure systems, with customary claims to land generally superseding legislative mechanisms, which have often been developed to address these claims as conflicts have emerged. Additionally, some more recent initiatives have evolved prior to the related policy. For example, legislation relating to Community Land Trusts in both the [USA](#) and England/Wales emerged after these bodies had started to become established, to provide a stronger legal framework for their future development. This is similar to land reform legislation as it relates to community land bodies in Scotland.

Table 8.3 illustrates the diversity of legislative mechanisms evident across the case studies, with key aspects of these mechanisms including:

- i) an emphasis on the recording of land rights and protecting rights in the long-term (e.g. through restricting division/resale of property);

²⁴ For a comprehensive summary of legal mechanisms for protecting communal land globally see Wily (2018) [Collective Landownership in the 21st Century: Overview of Global Trends](#), *Land*, 7, 68 1-26.



- ii) limiting the exploitation of natural resources to sustainable levels;
- iii) creating greater opportunities for the involvement of local communities in decision making processes relating to land;
- iv) affordable housing provision and equitable development; and
- v) increasing the security of customary rights of tenure of indigenous groups (e.g. in [Kenya](#)).

Table 8.3 Examples of legislative mechanisms related to communal and community land tenure evident from the case studies

Country	Tenure	Relevant policy or legislative mechanism
England and Wales	Common Land	Commons Registration Act 1965 created a 'commons register'. Commons Act 2006 established Commons Councils (with regulatory powers), protective measures against encroachment/development, updated registers and prohibited severance of commons rights from the property.
Italy	Common Land	The Italian Government unified all laws pertaining to common lands under a single framework in 1927 (Law 1766/1927). This failed to work well in practice, due to the variety of rights and situations. Seen as an attempt to abolish the related rights by subsuming them within the dominant system of private tenure.
Mexico	Agrarian communities and Ejidos	Social property system set out under agrarian reforms. Legal basis for agrarian communities and ejidos (plots of land granted by the state to communities through land redistribution). Article 27 reformed 1992 allowing privatisation of ejido land to enhance tenure security via registering and titling land rights.
Norway	State Commons	State commons introduced into Norwegian legislation in 1857 to limit exploitation of forest resources; non-forest resources incorporated into the Act on Mountain Commons 1920. Some 195 state commons comprise 2.6 million hectares. State-owned forestry company is legal owner of the state commons.
France	Municipal/ Communal forest tenure	Forest Code 1927 provided protection/control of forest activities and opportunities for communities to participate in management via municipal councils. 'Forest Law' 2001 requires owners to develop management plans. Charter for Forest Territory embeds people into decision-making.
South Africa	Municipal/ State Commonage	Post-1994 'new' commonages via Provision of Land and Assistance Act 126 of 1993 (part of a land redistribution programme) require land is used in the public interest. Large areas in municipal control have potential for redistribution but restricted by long-term leases to commercial farmers.
United States	Community Land Trusts (CLTs)	Key features of CLTs in the US defined since 1992 (Section 213 of the Housing and Community Development Act). This requires an open membership from within the defined community and a tripartite board structure (a third each from the defined community, residents' representatives, and wider stakeholders).
Kenya	Community Land Act	National Land Policy (2009) and changes to National Constitution (2010) ended the legal status of community lands as unowned and/or un-registerable. Community Land Act (2016) brings community lands under formal community title by identifying and registering customary holdings.
Norway	Finnmark Estate	Finnmark Act (2005) meant Norwegian State was no longer the owner of the county's unsold or unowned land. 95% of the county transferred to the inhabitants (Finnmark Estate, governed by a Board of directors appointed by the Sámi Parliament and Finnmark County Council). Finnmark Commission identifies individual and collective ownership and possession rights.



While registration and titling of land rights represents an important opportunity and current direction of travel in some cases, it is apparent from some case studies (e.g. [Mexico](#)), that in the longer term this shift towards land titling can lead to increasing privatisation of land parcels and potential loss of some communal tenure aspects.

Critically, many of the underlying aims and objectives of these legislative mechanisms and the related approaches to communal and community tenure reflect many of the specific aims of the Scottish Government and the Scottish Land Commission. For example, CLTs in the US and England have been specifically focused on the development and provision of affordable housing, in particular to access land for housing (a core objective of the Scottish Land Commission). Emphasis has also been placed on increasing the provision of high quality affordable housing in disadvantaged areas (e.g. by utilising vacant and derelict land) and areas with increasingly high property values, where people in lower income brackets are excluded from the housing market. Specific measures developed at municipal levels in [Germany](#) have also been driven by increasing demand for affordable housing, with the emphasis on incentivising and enabling local groups to purchase municipal property to address housing shortages.

The historical development of land rights claims and the re-allocation of land and land rights in some case studies (e.g. [South Africa](#), [Mexico](#) and [Italy](#)) illustrated the importance of power relations and the role of markets in influencing trajectories of land reform, land re-distribution, and re-amalgamation over time. Land reform legislation was not found to exist in isolation and the potential impacts (positive or negative) of any reform measures related to communal and community ownership were likely to have been affected by wider socio-economic factors (including human rights dimensions). In most cases, there was not an explicit focus on reversing or tackling concentrated patterns of landownership, which is a key driver in Scotland. Nevertheless, case studies related to indigenous land rights in particular (e.g. [Kenya](#) and [Norway](#)) reflect the current emphasis in Scotland on equitable distribution of land and land rights, including in relation to generating wider economic activity and wider benefits in rural and urban communities.

A number of specific legislative measures evident within the case studies (see Table 8.3) have been targeted at improving the accountability of decision-making processes and increasing opportunities for geographic communities to input meaningfully to these processes. This reflects a wider emphasis in Scotland on community empowerment²⁵ and in engaging communities in decisions relating to land (as detailed in the Scottish Government's guidance, published in 2018²⁶). In other contexts, the establishment of a

²⁵ For example, within the Community Empowerment (Scotland) Act 2015, as part of the Scottish Land Use Strategy (2016-2021), as a component of the Land Rights and Responsibilities Statement (2017).

²⁶ <https://www.gov.scot/publications/guidance-engaging-communities-decisions-relating-land/>



legal basis for Commons Councils (as democratic empowered structures) in [England](#), the development of Ejido Assemblies in [Mexico](#), the establishment of the Sámi Parliament in Finnmark in [Norway](#), the use of Norwegian Mountain Boards as governance structures in relation to [Norwegian State Commons](#) and the development of the GIEFF system in [France](#) all represent examples of established and functioning structures of communal governance of land and natural resources of relevance to the Scottish context.

Additionally, many of the systems outlined in the case studies place an emphasis on the re-distribution of agricultural land and increasing access to agricultural land for farmers. This chimes with the original driver for the establishment of a CLT in the [USA](#), as well as the core rationale for the establishment of the Ejido system in [Mexico](#), common grazings in [England and Wales](#), the State Commons in [Norway](#) and (in more extensive land use terms), the Finnmark Estate in [Norway](#).

8.3 Key additional themes from the case studies

8.3.1 The role of communal/community tenure in delivering local development and wider public benefits

The case study analysis showed clearly that communal/community systems of ownership can play an important role in relation to the delivery of both wider public benefits and local services (e.g. in [England and Wales](#), [Italy](#), [Mexico](#), [Canada](#) and [USA](#)). These tenure systems are key components of local-level socio-economic development and associated public benefits include the maintenance of valued environments and landscapes. For example, community forestry, agriculture and other activities, including tourism, that are carried out on communally owned land can be highly productive and bring considerable social, economic and environmental benefits for local communities who exercise a substantial degree of control over these activities.

The relatively low intensity of management on many common land areas has also resulted in these areas being designated and maintained in the long-term, providing a range of ecosystem services and use values, as well as often representing cultural systems in their own right (see, for example, [England and Wales](#), [Italy](#), [Mexico](#) and [Norway \(Finnmark\)](#)). The loss of these systems, combined with an over-emphasis on productivity and private tenure, can therefore result in the loss of public goods – a consideration of increasing relevance as resource demands and pressures increase globally. This represents an interesting counterpoint to the prevailing emphasis on agricultural productivity and wider economic growth²⁷, which, based on findings from the case studies (e.g. common land in England, the Italian Commons and the Mexican Ejido

²⁷ See for example the [Scotland's Economic Strategy](#) and the Scottish Land Commission's [Strategic Plan](#), which include an emphasis on productivity.



system), may potentially influence a reduction in the area of communal land due to the parallel emphasis on privatisation and intensification.

Additionally, as these systems offer mechanisms for people to both connect with the land and facilitate local-level development, they have the capacity to reverse out-migration trends (this was the case in [Mexico](#) and the [USA](#)). In Mexico, for example, members of ejido communities have been able to develop empowering connections with the land, with some evidence to suggest that this has helped to reduce the migration of (young) people away from rural areas to urban areas or indeed to other countries.

8.3.2 Learning from municipal ownership systems; the importance of strong, locally controlled governance institutions

Municipal ownership was generally found to be a secure form of tenure, wherein the legal title is not held by the community, but by the state (often at regional or municipality level) on their behalf. Numerous examples of municipal ownership exist, particularly in [Norway](#), [France](#), [South Africa](#), [Germany](#) and the [USA](#), with potential for learning from these examples, in relation to (for example) asset transfer and co-management of land, assets and resources in a Scottish context. Critically as highlighted by webinar participants ([Annex 14](#)), the extent of devolution of governance to local levels is likely to be fundamental in determining the extent of community involvement (or control) in municipal ownership systems.

The case study of [Germany](#) also illustrates the potential for municipalities to utilise the local planning system in combination with community asset acquisition to facilitate affordable housing development. The experience of state and community commons in [Norway](#) demonstrates the importance for local communities to have control over the land resource, in conjunction with other stakeholders and in balance with the national interest. This is dependent on strong institutions at the local level and avoiding a reliance on individuals or interest groups. These institutions must be legally defined, trusted, stable, equal, and provide arenas for discussion. While contributors to the Norwegian case study were more confident in the functioning of ‘community commons’ rather than state commons in underpinning local governance; they recognised a need to strengthen local competencies, and balance local vs. national interests (a key feature of the current review of the Norwegian ‘mountain law’). Additionally, as apparent from the case of municipal forest tenure in [France](#), those who participate in discussions relating to resource management are often predominantly ‘technical actors’ and not citizens – with a recognised need to increase awareness and interest among the wider community to increase community participation. This reflects wider issues around participation and community capacity apparent in other case studies (e.g. common land in [England](#) and Community Land Trusts in the [USA](#)).

Critically, municipal forms of tenure differ from conventional understandings of ‘community ownership’, in that the legal title may remain with the state or a local authority



and not the relevant geographic community. Nevertheless, in many respects the forms of municipal landownership examined in the case studies in [Section 5](#) reflect many of the characteristics of community ownership in Scotland (e.g. an emphasis on local-level control, elections and democratically accountable governance structures). Municipal ownership can also deliver a high level of community input into decision-making processes around land and assets.

8.3.3 The importance of scales of ownership and governance

The scale of ownership and governance can have implications for the degree of local community control, as apparent from the case study on community land trusts in the [USA](#) (and review of relevant wider evidence on CLTs) and the importance of local-level governance structures highlighted in case studies of municipal ownership (e.g. in [Norway](#) and [Germany](#)). Importantly, the notion of smaller municipalities as found in other countries (e.g. [Norway](#)), and the degree of control over local assets, contrasts considerably with the current situation in Scotland, where municipal (or local authority) areas are considerably larger and community councils are considerably less empowered. In practice, this impacts on the scope for ‘municipal ownership’ to adequately represent local interests following a participative model of democracy.

The relevance of municipal models of tenure to community ownership models is therefore largely dependent on the relationship between the municipality and the government of the country in question (see [Annex 14](#)), and the existence of an empowered and autonomous model of local governance. Despite the similarities and overlaps between the main forms of communal/community tenure, the degree of local control associated with municipal ownership can vary from full control to limited control which involves varying levels of community involvement mediated by the organisation that holds legal title (see Figure 8.2).

Figure 8.2 Degree of local control in municipal ownership models in the case studies

<p>Full control <i>Localised, participative, democratic processes for managing land and assets</i></p>
<p>Partial control <i>The community is part of the decision-making process and nominates representatives on to the governance structure for the communal property</i></p>
<p>Minimal control <i>Varying levels of community involvement determined by the organisation that holds legal title to the land/assets</i></p>

Despite the relatively high levels of community security of tenure evident in CLTs, in some cases the scale of the community can also present challenges in relation to genuinely engaging with and empowering large-scale communities. For example, this was the case in the citywide Community Land Trusts in the [USA](#) which faced challenges in engaging meaningfully with a very large defined community.

In relation to all forms of communal/community land it is apparent that an optimum scale for community and governance (which facilitates meaningful levels of local community control) may exist. This suggests greater potential for hybrid or two-tiered models which can facilitate greater professionalisation of approaches without subsequent loss of local community control aspects. Such an approach may be valuable for delivering housing and/or renewable energy initiatives.

8.3.4 Capacity, accountability and clarity of roles and rights

In relation to all forms of community and communal tenure, there is a requirement for democratic institutions (and principles of working) at local level with sufficient capacity to collaborate effectively and engage with opportunities as they arise (see for example [England and Wales](#), [Mexico](#), [Norway \(Finnmark\)](#)). Accessing, developing and retaining sufficient capacity represents a key challenge, requiring a balance between ensuring sufficient ability to develop and expand and retaining a strong emphasis on local engagement and control. As demonstrated in the analysis of the [Sámi people in Norway](#), some communities may require further support to facilitate sufficient capacity building to be meaningful partners in land use decisions, a lesson which can be applied to



marginalised/remote communities in Scotland (including in urban areas). Additionally, in cases where assets acquired by communities have previously suffered market failure whilst under public or private ownership, significant capacity, skills and time may be required to release the development potential of the asset(s). As webinar participants noted, other landowner types (e.g. private, public) also face capacity constraints potential exists for shared learning between landowner types relating to overcoming capacity constraints (see [Annex 14](#)).

Several case studies also revealed the importance of clear information and records/registers, as well as clarity in relation to roles, responsibilities and legal rights ([England and Wales](#), [Italy](#), [Mexico](#) and [Kenya](#)). These are critical aspects of communal land tenure systems to avoid the potential for the loss of rights as demands on resources and government policies shift and evolve over time. In [Mexico](#), accountability and transparency in policy-making, combined with new legislation related to landownership and redistribution, are fundamental for a successful land reform process that brings benefits for both rural and urban areas.

8.3.5 The role of partnership working and state and non-state actors

The importance of communities working in partnership with state and non-state actors to deliver community and wider public benefits is apparent from a number of case studies, including in relation to the delivery of housing through CLTS in the [USA](#), communities working with planning authorities in [Germany](#) and co-management of forest resources between the state and communities in [France](#). As well as national and local government bodies, non-state actors (e.g. non-for-profit organisations and the private sector) can play important roles in delivering asset-based community development in some contexts (e.g. the [USA](#) and UK). This reflects the emergence of community landowners in Scotland in recent decades, which have often received support from both non-state and state actors as they have formed and developed over time, with an increasingly well-established funding and support network (see [Section 3.2](#)). Non-governmental organisations can also play important roles in supporting efforts by indigenous communities to formalise their land rights (see [Section 7](#)).

Renewable energy constitutes a key emerging area of resource use (and conflict) in [Norway \(Finnmark\)](#), [Canada](#) and [Norway \(municipal ownership and commonage\)](#). In some cases this has illustrated the importance of security of tenure for indigenous groups (and more generally) in relation to deriving some of the benefits from renewable energy developments located near their communities through their land rights or through direct partnership in initiatives with energy developers. This is a narrative which is also reflected in Scotland (e.g. in relation to major wind energy proposals in the Outer



Hebrides²⁸), with the [Germany](#) and [Canada](#) case studies highlighting the potential for partnership approaches (between communities and wider public and private interests) to the development of community energy initiatives.

8.3.6 The potential of Community Land Trusts

The CLT literature and [USA](#) case study evidence the key role of the state and wider partners in the emergence of the CLT model, which has been fundamental to formalising structures, and ensuring the availability of financial support. Stewardship of the land and housing (and long term affordability) remains the key strength of CLTs and this factor can have the greatest impact when employed at scale, which often requires partnerships with government. This ‘up-scaling’ requires professionalisation and can have implications for community engagement and control aspects, requiring a careful balancing of CLT activities to ensure the strong connection and relationship with the local communities they represent are maintained. The involvement of wider stakeholders and funding bodies can also result in the potential loss of meaningful localised control in some cases.

Critically, larger scale CLTs with a singular focus were found to have had considerable success in relation to the delivery of affordable housing; however, CLTs are unique largely due to their focus on localised community control in combination with ownership of land/other assets. Related to the points discussed in Section 8.3.3 above, the increased scale and sectoral focus (on affordable housing) within many CLTs limits the potential of these bodies to address a wider range of issues (e.g. greenspace, business development spaces etc.) at more localised levels in ways which empower the communities concerned and engender local ownership of local challenges. An optimum scale or tiered approach to CLTs may exist, as is emerging in both the USA and England (see [Section 6](#)). This may have implications in a Scottish context, as community ownership moves further into the urban sphere (increasing the potential for learning from wider CLT examples).

In some cases, CLTs in the USA have established separate organisations to take forward the housing development component of their activities to delineate functions clearly. This is a process which is reflected in Scotland, with many land trusts establishing commercial arms to take forward development and energy initiatives. As a successful delivery model for affordable housing in the USA and England, the CLT model may offer potential for the expansion of housing opportunities in Scotland, particularly in urban contexts, for reversing the decline and/or gentrification of urban areas.

²⁸ See for example [reports](#) relating to the proposal for a major 181 turbine renewable energy proposal on Lewis subsequently rejected by Scottish Government.



In practice, community land trusts in Scotland share the key features of CLTs in both the USA and England: asset/landownership for community benefit and place-based participative governance. However, they are commonly focused on community development from a holistic perspective as opposed to the more singular focus on housing common in many CLTs outside of Scotland. The approach taken by Scottish CLTs highlights the potential for CLTs more generally to develop a more multi-faceted approach to community development (beyond a housing focus), as is beginning to occur in both England and the USA.

A key factor in the continued establishment of CLTs in the USA is rising land values and the need for a counter balance to a further widening of the wealth gap in future decades. CLTs remain a niche component of affordable housing in the USA and the UK and advocates of the model recognise an increasing need to increase awareness of its potential for delivering permanently affordable housing.

8.4 Lessons for Scotland

It is apparent that while community ownership of land in Scotland is an important and currently active agenda, in many countries around the world community engagement and involvement in landownership and land management is well established in a variety of formats.

The geographic, socio-economic and political-legal systems often vary considerably in international examples and caution should be exercised when drawing lessons for Scotland. Nevertheless, there are many similarities. These similarities relate to international examples of communal agricultural tenure systems and ownership of land and assets by community bodies. The international dimension offers a rich source of learning and inspiration from a variety of perspectives and this final section considers specific learning points for application to the Scottish context.

As Aitken (2012) concludes, due to the complexity of ownership formats internationally and the varying emphasis of the importance of ownership, understanding community ownership in an international context requires consideration of governance structures and processes for managing land and associated rights (as opposed to a singular focus on who owns the legal title). In Scotland, this has implications in relation to the ongoing Local Governance Review which aims to reform the way that Scotland is governed to give greater control to communities (e.g. over public services delivery) by considering how powers, responsibilities and resources are shared across government spheres and with communities²⁹. Enhancing and defining the scope and power of local democratic

²⁹ The Local Governance Review in Scotland which is being conducted by COSLA and the Scottish Government (2018-2019) see: <https://www.gov.scot/policies/improving-public-services/local-governance-review/>



structures offers potential for providing a mechanism for co-delivery of services (between communities and the state) and/or transfer of responsibility for land/other assets to communities via a locally-controlled municipal ownership model.

In broad terms, many of the case studies evidence a gradual emergence and evolution of forms of tenure and approaches to reform (e.g. common grazings, common land in England etc.). Nevertheless, it is apparent that major shifts can also occur, such as in the case of revolutions and dramatic political upheavals (e.g. in Mexico and South Africa), which can result in constitutional changes and the development of defining legislation. Over time, wider factors including agricultural intensification, urbanisation and economic downturns can result in changes in emphasis and (in some cases) increasing amalgamation and/or privatisation of land (e.g. see the Italy, Mexico and South Africa case studies). Additionally, an increasing emphasis on asset based models of community development and a 'localism' emphasis in wider economic and social policy has placed greater emphasis on community asset models generally across Europe and more widely.

In general, it is apparent from this review that there is wider scope for the development of communal and community models of ownership in Scotland, including those which relate to communities of interest and communities of place – reflecting the wide array of ownership and tenure formats and governance structures evident in the case studies reviewed here. Based on the wider literature and case studies carried out for this review and the preceding discussion a number of key lessons for Scotland are identified below, including potential areas for further research relating to learning from specific aspects of the international context to inform the debate in Scotland:

- **The role of state and non-state actors within CLT structures:** The value of the tripartite board structure of CLTs in the USA is widely recognised. The formalisation of the role of the public sector and wider NGOs through this structure may offer scope for developing this model in a Scottish context by accessing wider power and funding networks³⁰. CLT models reviewed in this report show the importance of developing strategic partnerships to facilitate growth and impact. There are also wider lessons in relation to the development of partnership models of ownership in Scotland, while taking into account the importance of maintaining local control. There appears to be considerable scope for further investigation of the potential application of the CLT model (and legal barriers, opportunities etc.) for affordable housing delivery in Scotland.
- **Anchor organisations and tiered models:** Currently, anchor organisations (predominantly development trusts) play a critical role in the delivery of

³⁰ Some community buyouts in Scotland having informally had board members from local authorities and NGOs



community asset ownership and management in Scotland. The USA case study and wider review of CLTs in [Section 5](#) highlight the importance of the development of bridging or ‘umbrella’ organisations at a regional level. These organisations could oversee the operation of groups of anchor organisations and provide support, guidance and a coordinated approach, as well as a conduit into national policy processes. Such approaches deserve particular consideration in Scotland, given the ongoing expansion in the number of anchor organisations and their increasingly key role in community development and services delivery.

- **Local governance reform and state-community working:** Municipal ownership models may offer considerable potential in Scotland, however, actualising empowering municipal ownership in Scotland within the existing local authority framework represents a key challenge. Nevertheless, considerable further potential would appear to exist for the development of collaborative approaches to asset ownership and management between communities, local authorities and other public bodies. There is scope for further consideration of the role of asset ownership and management within ongoing reform of local governance in Scotland. The development of more effective partnerships between the state and citizens offers scope for more effective services delivery, potentially negating the need for costly land transfers in certain contexts and ensuring capacity is maintained through a shared delivery model. Notably, ‘re-municipalisation’ and other approaches to municipal ownership and management in Germany offer lessons in relation to the reversal of privatisation of public sector services and assets such as housing to involve new actors in service provision and the development of more democratic systems.
- **Hybrid models of ownership:** Similar to (and overlapping with) the potential for further development of municipal landownership in Scotland, considerable scope appears to exist to investigate and develop partnership or ‘hybrid’ models of landownership, potentially including partnerships between communities (of place and of interest) and NGOs, communities and private landowners and the state. Existing partnership models developed in Scotland under the National Forest Land Scheme for co-delivery (community and state) of community forest management offer scope for wider consideration in this regard. Partnership and ‘shared benefits’ models (e.g. indigenous groups in [Canada](#) working with the state to deliver renewable energy initiatives and CLTs in the [USA](#) working in partnership with city authorities to deliver affordable housing) may offer particular potential in relation to key development arenas



including housing and renewable energy, potentially releasing access to otherwise out of reach funding.

- **Collective private models of ownership** equivalent to the state incentivised model of collective private forest ownership evident in the French case study (the GIEFF model - Forest Economic and Environmental Interest Grouping) may have potential in a Scottish context. Such approaches offer the potential for building new frameworks of collaborative land management and challenging the prevailing culture of exclusive private ownership of land and assets, as well as delivering wider public benefits through taking landscape scale approaches to management. Further exploration of the outcomes and challenges faced by established and emergent partnership models in Scotland and elsewhere are worthy of further research.
- **Cultural dimensions of community/communal tenure:** Existing models of community and communal landownership in Scotland have important cultural dimensions – capturing and valuing these dimensions represents an important aspect of the evolution of new approaches. Additionally, any expansion of communal and community ownership models face the challenge of the prevailing emphasis on private, exclusive property ownership. Addressing these factors requires greater awareness of the existence and value of alternatives (both within and beyond Scotland).



9 References

NB. References for individual case studies are included in the annexes.

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10 Annexes

The remainder of the report presents the case studies. References for individual case studies are included in footnotes.



Annex 1: England and Wales - Common land

History and policy/current governance context

Common land areas in Britain originated from areas over which a custom of common use had been established prior to the creation of the feudal system and the dominance of exclusive legal ownership of land. In England and Wales, common land areas became a component of 'manors' (administrative units of feudal tenure) and regulated through the Manorial Courts³¹. This system appointed owners of land (Lords) and provided a system for commoners to maintain their customary rights over the land. The rules or customs of the commons community were implemented by a jury of commoners overseen by the steward of the Lord, as a basis for sustainable management³². The majority of these common land areas were subsequently lost due to processes of approvement³³ and enclosure. This was carried out either by the passing of (often controversial) legislation (including the Enclosure Acts of 1845-1899)³⁴, which removed or limited common rights linked to the land, or by purchase of the ground rights and common rights to facilitate exclusive private ownership of previously common land - thereby increasing the land value³⁵. This process was widespread from the 16th Century onwards, driven by a desire to improve and intensify farming practices during the agricultural revolution. Common land therefore became increasingly restricted to rough grazing in the uplands and smaller land parcels (e.g. village greens) in lowland areas by the 19th Century³⁶.

Current status

In England and Wales common land is recognised under the Commons Registration Act 1965, which attempted to have all common land recorded through the creation of a national register. However, many commons were not successfully recorded on the register and some commons became deregistered due to loopholes in the legislation³⁷. The commons recorded on the register account for 8% of Wales (173,366ha across 1615 units) and 3% of England (372,941ha over 7,052 units).

³¹ Common Land Toolkit 2FS: [Origins and History of Common Land](#)

³² See previous footnote.

³³ The Statutes of Merton (1235) and Westminster (1285) gave landowners the right to enclose or *approve* surplus grazing over and above that required to satisfy commoners rights, which facilitated a steady process of reclaiming previously common land.

³⁴ As well as a number of other Acts of Parliament including the Metropolitan Commons Acts 1866 to 1898, Corporation of London (Open Spaces) Act 1878, Commonable Rights Compensation Act 1882 and Law of Property Act 1925 (see: Ashbrook, K. (2013) [Modern Commons: a protected open space?](#))

³⁵ See: [Parliamentary Enclosures ReFRESH 3 \(Autumn 1986\)](#) for further data on enclosures.

³⁶ Clayden, P (2003). *Our Common Land: the law and history of common land and village greens*. (Henley-on-Thames: Open Spaces Society).

³⁷ Common Land Toolkit 4FS: [Updating the Commons Registers](#)



Common lands are unevenly distributed across Wales and England (see Figure 10.1). In England, the Southern Lowlands have large numbers of very small commons (often near or within population centres), while the northern and western uplands have lower numbers of larger commons (with the majority of the commons in these regions)³⁸. Certain additional areas in England are exempt from registration under the 1965 Act including the New Forest commons (21,995ha), Epping Forest (2,458ha) and parts of the Forest of Dean (3,100ha). Across the whole of Britain common land (or varying types and legal status) accounts for some 1.16M hectares of land³⁹.

Mechanisms of ownership/tenure (Rights of commons)

There is no single definition of common land, but in general terms commons consist of areas where the rights of the legal owner are restricted and where other people (commoners) hold beneficial use rights over the land. These rights may be held jointly by user groups, or held as individual rights linked to the deeds of another property but used communally. In some cases individuals may use the land for part of the year (e.g. for cropping) with the same area grazed communally for the rest of the year. In areas where there are no active commoners, these common use rights may have been neglected.

The full extent of all rights associated with the commons is not defined in legislation and while the extent of common grazing activity is reasonably well understood, the extent to which some rights are used is unknown. The range of use rights on common land⁴⁰ include: i) pasturage (grazing) rights for domestic livestock (the most common right); ii) estovers, the right to gather wood, although registered on 22% of English commons this activity is now more localised; iii) turbary, which allows users the right to cut peat for fuel, a relatively widespread right but likely to be in decline; iv) pannage, the right to graze pigs on acorns or beechmast in woodlands in Autumn, which is now little exercised; v) common in the soil, which relates to rights to extract minerals such as sands and gravels, a very localised and rarely exercised right; and vi) piscary, the right to fish, which occurs on 262 commons in Wales and England, although it is unknown to what extent the right is exercised. A range of further additional rights occur, often heavily localised, including rights to hunt wild animals

³⁸ For further data on location and size see: the [Foundation for Common Land](#) and [Common Land toolkit and guidance notes](#).

³⁹ Including areas in England and Wales recorded under the Commons Registration Act 1965, common land areas not subject to the 1965 and 2006 Act (e.g. the New Forest) and areas recorded as common grazings in Scotland under the Integrated Administrative Control System (IACS) in 2009.

⁴⁰ For further information on rights linked to common land see: www.foundationforcommonland.org.uk/rights-of-common



for food, including fowling (removing birds or eggs), wildfowling and rights related to seaweed removal, shellfish and certain plants.

Extent and process of (community) control

Common land is not universal ownership and does not reflect community ownership as it is normally defined in Scotland, but these systems do represent a form of communal control. Commons are managed through user communities, which include the holders of the common use rights and the legal owners of the land. In practice these user groups are governed collectively under a set of formal or informal controls and collective understandings, often linked with strong traditions and identities.

In 2006, the Commons Act was passed with the aim of protecting common land through sustainable management to ensure the delivery of benefits for farming, public access and biodiversity. The 2006 Act⁴¹ provided for the establishment of Commons Councils⁴² - local level democratic structures, with powers to regulate grazing and other agricultural activities and improve the management of common land areas. Additionally, the Act reinforced protections against encroachment and unauthorised development, required that commons registration authorities bring their registers up to date and prohibited the severance of commons rights from the property to which the rights are attached.

Challenges and opportunities

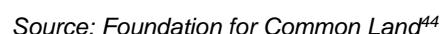
Common land areas in Britain represent an important element of the agricultural and wider rural economy, provide a wide range of ecosystem services (including carbon storage) and include a large number of designated sites and landscapes of high scenic value. Common land is also an important component of the UK's National Parks, with commoning having influenced the cultural landscapes of the Brecon Beacons, Dartmoor, the Lake District and the New Forest (with 45% of all common land in Wales and 48% in England occurring within National Parks)⁴³. Larger contiguous commons are also home to a number of rare domestic breeds, including Herdwick sheep in the Lake District and Dartmoor and Exmoor ponies and many commons areas host a wide range of historic and archaeological features due to the history of low intensity management. All common land also incorporates a statutory right of access, with the Countryside and Rights of Way Act conferring rights of pedestrian access on all common land and rights of access for cyclists and horse riders also existing on many common land areas.

⁴¹ See: <https://www.gov.uk/government/collections/common-land-guidance-for-commons-registration-authorities-and-applicants>

⁴² For further information on commons councils see: <http://www.cumbriacommoners.org.uk/commons-councils>

⁴³ Data from the [Foundation for the Commons](#) (What Commons do for the nation).

Figure 10-1 Common land and common grazings of Great Britain



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Annex 2: Italy - Communal property regimes

A common characteristic of all communal property in Italy is that in legal terms it represents a form of private ownership (or in some cases public ownership), where the associated rights are exercised and managed by a community of people who have the right to use the land and make decisions about the future of these areas.

Some 5% of Italy is thought to be under communal ownership, with these areas mainly owned by two groups: i) small groups of individuals (e.g. families); or b) the local residents of a hamlet (referred to as 'Usi civici' or civic use of lands)⁴⁵. Relevant examples include:

- i) the *Regole ampezzane*⁴⁶ in Cortina d'Ampezzo in Northern Italy, where a form of collective private ownership of forests is used to deliver sustainable forest management by following strict rules which do not allow the ownership or management of the land to change and limit access to the resources to descendants of the original families;
- ii) the *Università Agraria di Tarquinia*⁴⁷, in central Italy, the origin of which can be traced back to regional farmers' associations in the Middle Ages which engaged in horticulture and farming. The *participants* (small-scale livestock breeders) exercised their right to cultivate land belonging to the papal state and other private lands and paid a rent to the municipality, with the remaining non-cultivated areas used as pasture; and
- iii) the right of *ademprio*, exercised by communities in Sardinia since the Middle Ages, where feudal lords were required to take resources (e.g. wood, grazing etc.) only after the fulfilment of local people's requirements. Following the laws of enclosure in 1820, the absolute ownership of common lands in Sardinia was transferred to local government (*Comuni*), with communal uses regulated by regional law in two categories (woods and pastures and cultivated land), with changes to the use of these areas subject to obtaining regional permission and possible only where there is a benefit to the majority of users.

Historically, communal land in Italy has suffered from a lack of clarity in the definition of these areas and the related property and rights arrangements⁴⁸. Furthermore, an emphasis on small scale private landownership as a driver of agricultural productivity by the Italian Government in the late 19th Century resulted in many municipalities being

⁴⁵ Aiken, M., Cairns, B. and Thake, S. (2008). Community ownership and management of assets. Joseph Rowntree Foundation. <https://www.jrf.org.uk/report/community-ownership-and-management-assets>

⁴⁶ See: <https://www.regole.it/>

⁴⁷ See: <http://www.agrariatarquinia.it>

⁴⁸ For further information on the history of Usi civici, see: Paolini and Mancini (2015). "[Usi civici](#)" the Italian side of the Commons. Conference paper (Commons Amidst Complexity and Change).



required to sell off their common land areas, including many parts of ecclesiastical estates, with over a million hectares of previously common land sold to private individuals or investors (or illegally occupied) during this period. This resulted in large numbers of new small-scale private owners of land (on which the common rights had been removed) in regions such as Piedmont, Liguria and Sardinia. In practice, this shift in tenure led to widespread deforestation, with the state also abolishing traditional grazing and wood gathering rights on many remaining areas of common land, resulting at the time in widespread fuel poverty.

The Italian Government unified all laws pertaining to common land areas under a single legal framework in 1927 (Law 1766/1927). This system of unification failed to work well in practice, due to the variety of rights and diversity of relevant situations, and was seen as an attempt to dismiss and abolish the related rights by subsuming them with the dominant system of private tenure⁴⁹. The future of Italy's communal systems of tenure remains uncertain, but many examples continue to prevail and various groups⁵⁰ have emerged with the aim of restoring and preserving these systems through legal arguments and creating awareness of the value of these areas.

⁴⁹ See previous footnote.

⁵⁰ See, for example, the Italian centre for the study of collective property which was established by the University of Trento: <http://www.usicivici.unitn.it/> and the Commons Association <http://www.demaniocivico.it/> which contains information on the relevant legal frameworks relevant to Usi civic and the history of these lands in Italy.



Annex 3: Mexico - Communal agrarian tenure (Ejido system)

History and policy/current governance context

Mexico has a long history of development of policies with regards to land tenure. In the second half of the 19th century, in the context of an increasingly agro-export centred economy, the post-colonial hacienda system of landownership was consolidated under liberal legislation⁵¹. This resulted in an extremely skewed distribution of landholdings by the early 20th century, which contributed to the Mexican Revolution (1910-1917). The Revolution ended with the establishment of the Mexican Constitution⁵², which included important rural and agrarian reform elements. These elements had considerable effects on landownership in Mexico.

The Constitution set out a new system of 'social property', embodied in agrarian communities (*comunidades agrarias*) and ejidos. The communal ownership of *comunidades agrarias* is recognised by the government, and they are the result of an historic form of landownership which in colonial times were known as 'indigenous towns' or 'pueblos de indios'⁵³. Ejidos are plots of land granted by the government to associations and communities, through expropriation and distribution of larger estates and properties (*haciendas* and *latifundios*)⁵⁴. At this time, ejidos could not be sold, mortgaged, confiscated or transferred⁵⁵. Transactions on parcels of land were prohibited, the commons could not be divided, membership of the ejido was controlled by the Agrarian Reform Bureaucracy⁵⁶, and ejido parcels could only be bequeathed to a single descendent or the spouse.

By the 1940s, policy emphasis had moved away from the agrarian sector, which had been assigned the role of providing cheap food for an increasingly urbanising and industrialising country. The social property sector became subject to increasing state regulation and an intricate system emerged. Alongside this, policies tended to favour the development of the private sector and the production of high-value export produce.

This gave rise to a dual agrarian structure, and a deepening regional differentiation between the 'north' and an impoverished 'south', where most of Mexico's indigenous

⁵¹ Assies, W. and Duhau, E. (2009). Land tenure and tenure regimes in Mexico: an overview. In: Ubink, J. et al. (eds.) *Legalising land rights. Local practices state response and tenure security in Africa, Asia and Latin America*. Leiden University Press, Netherlands.

⁵² Velásquez García, E. et al. (2011). *Nueva historia general de México*. El Colegio de México, Mexico.

⁵³ Morett-Sánchez, C. and Cosío-Ruiz, C. (2017). [Panorama de los ejidos y comunidades agrarias en México](#), *Agricultura, sociedad y desarrollo*, 14, pp. 125-152.

⁵⁴ Wolfe, M. (2017). *Watering the revolution. An Environmental and technological history of agrarian reform in Mexico*. Duke University Press, USA.

⁵⁵ Kourí, E. (2015). [La invención del Ejido](#)

⁵⁶ This tended to discourage incorporation of new members in order to avoid fragmentation.



peoples can be found. The social property sector increasingly became a reservoir of cheap labour and subsistence production on gradually ever-more fragmented parcels of land⁵⁷. By the late 1950s, land distribution policies made a return in response to large-scale peasant unrest in the northern states.

By the 1960s, political and civil unrest in Mexico mounted. The early 1970s saw the emergence of radical rural movements and guerrilla activity in various parts of the country. The 1982 Mexican crisis brought an end to the 1970s development policies focused towards the social property sector.

It was in this context that the 1992 reform initiative began and redistribution ended. At the time of the 1992 reform, some 28,000 ejidos had been created, with 2,300 comunidades agrarias recognised, which together made up the social property sector.

The 1992 reform of Article 27 allowed for the privatisation of communal land. The sale and rental of ejido lands was legalised, making them available for parcelisation and privatisation. This created a legal market for ejido land that replaced the illegal market that was known to have existed prior to reform and ended the existence of the social property sector. The reform sought to enhance tenure security through certification, with the aim of registering and titling land rights in ejidos in order to strengthen land tenure security, improve the efficiency of rural land markets (and credit markets), and pave the way for privatisation.

The mechanism(s) of ownership/tenure

Ejidos are now effectively a form of social and private property that contain a mix of individually parcelled land (made possible by the 1992 reform) and some land which is held and used communally. They are one of four types of landownership found in Mexico: private property, or small property, due to the extensive limitations in landownership established in the law; social property, including ejidos and agrarian communities; national land; and wasteland.

Ejidos tend to have small plots of land owned by ejidatario families and a specific area designed as ejido communal land, which is owned by everyone in the ejido. It has been calculated that approximately 5.6 million people live in agrarian nuclei (either in ejidos or agrarian communities), covering more than 100 million hectares and representing 53.4% of Mexico's total surface area. There are approximately 29,519 ejidos across the country⁵⁹. They are a modern institution, having only been in existence for 100 years, and represent an attempt by the Mexican government to fight the historical accumulation

⁵⁷ Assies, W. and Duhau, E. (2009). Land tenure and tenure regimes in Mexico: an overview. In: Ubink, J. et al. (eds.) *Legalising land rights. Local practices state response and tenure security in Africa, Asia and Latin America*.



of land in the hands of the few, and to address the shortage of land held by the majority of the Mexican population by the beginning of the twentieth century.

Ejidos and agrarian communities vary in size (in terms of land extension and people) across the country depending on the state. In Mexico, large estates are forbidden, and individuals cannot own plots of land considered to be larger than smallholdings (known as 'small property'; *pequeña propiedad*). The small property in Mexico is limited to 100 hectares when land is used for livestock and the production of vegetables; 150 hectares when land is used for cotton plantations; and 300 hectares when land is used for the production of bananas, sugar cane, coffee, henequén (sisal), rubber, palm trees, olives, quina, cocoa, vanilla and fruit-bearing trees. Small property for forestry cannot exceed 800 hectares.

Any economic activity can be conducted on ejidos as long as it is permitted by law. 56.4% of social property in Mexico is used for agriculture and most of the plots of land are considered as smallholdings. Within these agrarian nuclei the main crops are maize, sugar cane and coffee, and many ejidos grow grasslands for livestock. Nevertheless, some ejido communities are engaged with tourism activities, forestry, arts & crafts, fishing and payment for ecosystem services schemes related to carbon capture and biodiversity conservation⁵⁸.

Extent and process of community control

Ejido communities establish their own rules and are governed through an Ejido Assembly and ejido governing bodies. Changes within the private plots and common land of ejidos cannot happen without the consent of the Ejido Assembly⁵⁹. All ejido members have voting rights to elect a leader (a *comisariado*).

Ejidos play a fundamental role in politics despite not being part of government itself⁶⁰. Mexico is a federal state with three government levels: national or federal government level; state level; and local (more than 2,000 municipalities). Ejido communities are associations or corporations of rural dwellers (and now, sometimes urban) which are organised and therefore have the capacity to lobby government. As they are very close to the municipal level of government, ejidos can easily access and influence local politics and municipal decision makers.

Successful stories of the collective management of natural resources in ejidos and agrarian communities can be found across Mexico. The most well-known cases are

⁵⁸ Morett-Sánchez, C. and Cosío-Ruiz, C. (2017). [Panorama de los ejidos y comunidades agrarias en México](#), Agricultura, sociedad y desarrollo, 14, pp. 125-152.

⁵⁹ Ley Agraria, *Mexican Agrarian Law* (1992) [Last reform of 25/06/2018]

⁶⁰ Varley, A. (1985). [Urbanization and agrarian law: the case of Mexico City](#), in *Bulletin of Latin American Research*, Vol. 4, no. 1, pp. 1-16.



related to community forestry. Specifically, the communities of Nuevo San Juan Parangaricutiro in Michoacán and the Union of Zapotecan and Chinantecan Forestry Communities (UZACHI) in Oaxaca⁶¹. In both cases, the communal ownership of forests has strengthened community cohesion, encouraged young people to remain in their communities, and improved the local economy by promoting agriculture, timber production and tourism.

In the case of the UZACHI communities, forest resources were being exploited in the 1970s by private companies, however with adequate organization, communities took control of their forest resources. For example, in the 1980s, four agrarian communities wanted to develop their own forestry services to encourage sustainable management. In 1992, the communities formed an association to provide forestry services and technical advice across the area of concern. The communities took responsibility for the forest (with permission from the Ministry of Agriculture) and management now takes places in common forest management units on the communally owned land. The community forest association (UZACHI) produces timber, promotes local employment and generates benefits for local people. The four communities are represented on the UZACHI management board and vigilance committee, alongside representatives of public bodies. Despite institutional barriers, corruption and lack of funds, community forestry seems to have a bright future, and this often due to the benefits that communities obtain from managing their natural resources themselves.

Key challenges and future directions

Many criticisms have been directed at ejidos because of the political, economic and social problems they have brought to the country⁶². For example, unlike in many other Latin American countries, the existence of ejidal and communal lands in Mexico has provided a source for illegal land development in the cities. It is estimated that in many Mexican cities more than 50% of the urban land development has occurred on ejido land through one form of illegal means or another. In Mexico City the urban growth from the 1940s onwards provoked the phenomenon of new informal settlements on ejido land and the impoverishment of urban dwellers. Indeed, when Mexico City started growing explosively, as a result of loopholes in the law and in policy, poorer residents settled in rural ejido lands outside the centre of the city⁶³.

It is also fair to note that the 1992 reforms have, in certain cases, further eroded women's rights on ejidos. Women in Mexico were largely excluded from the land redistribution

⁶¹ Oviedo, G. (2003). The community protected natural areas in the state of Oaxaca, Mexico, WWF, Switzerland.

⁶² Kouri (2010)

⁶³ Varley, A. (1985). [Urbanization and agrarian law: the case of Mexico City](#), in *Bulletin of Latin American Research*, Vol. 4, no. 1, pp. 1-16.



programmes. Most ejidal land is held by men, and the majority of women are not voting members (ejidatarios) of ejidos and do not hold use-rights. After the 1992 reform, only ejidatarios were allowed to vote on new regularisation and tenure regimes, and therefore only existing ejidatarios' land rights were strengthened through these processes⁶⁴.

Despite criticisms that ejidos are an economically inefficient form of land tenure, the ejido has proven to be a resilient institution, and rural dwellers seem to be comfortable with collective ownership and the mélange of social and private property within their communities⁶⁵.

⁶⁴ USAID (n.d.). [USAID country profile. Property rights and resource governance - Mexico](#)

⁶⁵ Yunez-Naude, Antonio, (2013), Old foods and new consumers in Mexico under economic reforms, Documento de trabajo N° 4 Serie de Estudios Rurales, RIMISP, Chile.



Annex 4: Norway – Municipal ownership and commonage

A system of state-owned and community commons

History and policy/current governance context

The history of common landownership and governance in Norway is extensive and pre-dates legal structures. The history of the Norwegian commons is intertwined with the history of rural Norway, therefore requiring an understanding of geography, climate, settlement patterns, farming and livelihood strategies throughout different periods, as well as economic and political history, technological change, and global market change⁶⁶. It is considered to have fostered a 'co-owner' agrarian system and society⁶⁷. The 'state commons' (*statsallmenning* in Norwegian) is largely comprised of the 'out-field' (*utmark*) land that was once owned by the Norwegian monarch (i.e. known as the 'King's commons' until 1814⁶⁸). The out-field is distinct, yet interdependent from the 'in-fields' (*innmark*); whilst the latter is largely cultivated for arable and other agricultural production, the outfield is more suited to grazing and forestry, as well as recreational use, renewable energy production, and often designated for nature protection⁶⁹.

The state commons were introduced into Norwegian legislation in 1857 to limit the exploitation of valuable forest products (and provide income to the Crown); non-forest resources were incorporated into the Act on Mountain Commons in 1920. Today, a total of 195 state commons comprise 2.6 million hectares of land in central and southern Norway (approximately 23%); i.e. all municipalities south of Nordland and Troms⁷⁰. The State-owned forestry company 'Statskog SF' is the landowner of the state commons and undertakes commercial timber production on the common land. The grazing rights, and the use of timber for farm buildings, fencing, and firewood, belongs to the local farming population (i.e. those who live and farm adjacent to the state-owned land)⁷¹. It appears that only one small state commons remains in Troms (i.e. north of Trøndelag); this is because the 1920 Act on state commons did not seek to cover Northern Norway. There is considerable overlap with the management of land in Northern regions by the Sámi reindeer herders (see the case study about the Sámi people in [Annex 11](#))⁷².

⁶⁶ A summary is provided by Sevatdal, H. and Grimstad, S. (2003). Norwegian Commons: History, Status and Challenges. Landscape, Law & Justice: Proceedings from a workshop on old and new commons, Centre for Advanced Study, Oslo, 11-13th March 2003, (p.96).

⁶⁷ Reinton (1961 in Sevatdal and Grimstad, 2003: 103).

⁶⁸ Berge, E. 2018. Understanding Norwegian Commons. Centre for Land Tenure Studies Working Paper 10/18. Norwegian University of Life Sciences. (p.3)

⁶⁹ In 2018, 58% of state commons were protected areas (NOUI, 2018 in Berge, 2018: 19).

⁷⁰ Berge (2018: 4); Hoffman, M. (2015). Community Commons in Norway: The role of common property in Norwegian outfield management. *Land Tenure Journal* 2015/01: 146-171 (p.156).

⁷¹ Hoffman, 2015.

⁷² Berge (2018: 4).



Common land in Norway may be co-owned and managed by agricultural communities (*bygdeallmenning*; referred to in English as ‘community’ commons), as well as so-called ‘hamlet’ commons (*realsameige*). In the case of community commons (*bygdeallmenning*), the land is jointly owned by the farms that have use-rights in that commons (not by the whole community). *Realsameige* is ownership in common, in which case the farms have a specific ownership share of the outfield (linked to taxation assessments). The typology of commons in Norway relates to different landowner types. These three common land types and the property ownership/use rights associated are summarised in Table 10.1.

It is noted that municipalities in Norway own land outwith state commons areas; however, this is under-represented in the cadastral map, in contrast with the clear boundaries of state and community commons. Problems also arise where hamlet commons are insufficiently documented in the cadastral map and are not updated on inheritance, therefore individual ownership and user rights are unclear⁷³.

Table 10-1: Norwegian commons as they emerged from the legislation in 1857 and 1863 until 1992.

Type of commons	Landownership	User rights*	Resources allocated according to:
State commons (<i>statsallmenning</i>)	State	State/fellow commoners	Needs of the farm
Private commons	Private owner(s)	Owner/fellow commoners	Needs of the farm
Community commons (<i>bygdeallmenning</i>)	Farms	Fellow commoners	Needs of the farm
Hamlet commons (<i>realsameige</i>)	Farms	Descendants of commoner	Ownership fraction
* “Rights of common belong to the farm as a cadastral unit and refer to the right to exploit specific resources found in the land defined as a commons” ⁷⁴ .			

Source: Berge (2018: 4)

The mechanism(s) of ownership/tenure

User rights in Norwegian commons are connected to the agricultural (and cadastral) unit, whether owned (i.e. freehold) or tenanted, rather than the person in control of the

⁷³ Sevatdal, H. and Grimstad, S. (2003). Norwegian Commons: History, Status and Challenges. Landscape, Law & Justice: Proceedings from a workshop on old and new commons, Centre for Advanced Study, Oslo, 11-13th March 2003, (p.125).

⁷⁴ Berge (2018: 4).



agricultural unit; hence, the rights cannot be alienated⁷⁵. The state commons (as public property) are managed to accommodate the interests of the local community (i.e. those to whom the commons 'belong', rather than 'own', and those who hold the rights to grazing and to timber for their own use), certain farms or groups of farms within the rural community, the State (i.e. national level institutions), and the wider Norwegian public⁷⁶. There are well-established open access resource rights for public use of the outfields of state commons (*allmenningsrett*)⁷⁷, and post-1950 saw an explosion of recreational activities that exploited the state commons, including cabin construction, fishing, and small game hunting.

The regulations of protected areas restrict the exploitation of resources on the state commons; and reduces the use rights of commoners; however, in practice, any new activities need permission of the State, which in turn increases the transaction costs of exploiting use rights. Where predators have reappeared due to environmental protection measures, the use of common pasture has declined by those with use rights in the state commons, and the rights of common use have declined in value⁷⁸. Over the past two decades, most national parks in Norway have been established on state commons, causing local tension due to the potential for minimal new employment opportunities, whilst generating considerable restrictions on new income-generating possibilities^{79 80}.

Extent and process of community control

The municipality has been the basis for local management in Norway since 1837⁸¹. There are two types of locally-elected management board that oversee local use rights in the state commons. Grazing rights and other upland resources are managed by a board appointed by the elected officials of the municipality, known as the 'mountain board' (*Fjellstyre*). The mountain board also manage hunting and fishing on behalf of the municipality. The 'commons board' (*allmenningsstyre*) is elected by and from the 'commoners' (i.e. those with user rights), to manage rights to non-commercial forest resources. Tensions can arise where larger farms utilise their rights to larger proportions of these shared resources. Whilst the community commons are not connected to the

⁷⁵ Sevatdal, H. and Grimstad, S. (2003: 95) and Hoffman, M. (2015).

⁷⁶ Sevatdal, H. and Grimstad, S. (2003: 118).

⁷⁷ As explained by [Norges Fjellstyresamband](#)

⁷⁸ Berge (2018: 19).

⁷⁹ Sevatdal and Grimstad (2003: 99).

⁸⁰ For example, Breheimen National Park was established on a community commons (Skjåk) in 2009, which was met with local resistance. Since the park's establishment, people are now considering how to use the National Park status to their advantage (Hoffman, personal communication, 21.2.19).

⁸¹ Berge (2018: 15) and Bryden, J., Bort, E. and Refsgaard, K. 2016. The Evolution of Local Government and Governance in Scotland and Norway. In Bryden, J., Brox, O. and Riddoch, L. (eds.) Northern Neighbours: Scotland and Norway since 1800. Chapter 5, pp. 63 – 91 (p.97).



municipalities in any way, they maintain a close dialogue, and they can be big landowners. The board of a community commons can effectively manage a large area (in some cases 50-90%) of a municipality.

The income from the renting of cabins on state commons is shared between the 'mountain board' and the state as landowner; the hunting of large game species is also managed by the mountain boards⁸². It is reported that over the past decade, the use of houses located on 'summer farms' (*seter*, located in the outfields) for new activities has become more accepted by the state as landowner. There are many cultural connections for the Norwegian public and access to their 'summer farm' (i.e. whether or not they remain active farmers); this is also demonstrated in the practice of '*friluftsliv*' – 'outdoor life'.

A small group of seven state commons are managed as community commons in Norway, because they do not produce timber beyond the needs of the commoners, and the State is therefore not able to sell timber commercially; as such they have delegated responsibility for the forestry component of these commons to the commons board⁸³. In other cases (e.g. Langmorkje), the state commons are managed as community commons, but do produce commercial timber for the international market. In this case, the right to manage and harvest timber commercially, not only for on-farm use, was devolved to the Langmorkje commoners in the 1940s⁸⁴.

A critical reflection on the development and ongoing management of the state commons illustrates a tension between local and national priorities, as implemented in the state commons, and therefore that "*the history of the management of the commons is one of the limitations on rights of the local community, transfers of powers to the central State, and developing regulations benefitting the national community*"⁸⁵.

Key challenges and future directions

The potential production of hydroelectric power in the early 20th Century initiated the process to identify the boundaries of the state commons, up to the northern regions of Nordland and Troms. In 1963 the Norwegian Supreme Court ruled in a case that the 'old ways' of using the commons did not mention energy production, therefore the commoners had no rights to the income generated, which instead was part of the 'remainder' (i.e. belonged to the state). Property rights theories illustrate the value of the 'remainder' – that which remains when all other use rights of a property are allocated –

⁸² Berge (2018: 18).

⁸³ Sevatdal and Grimstad (2003: 120).

⁸⁴ Hoffman, personal communication (21.2.19).

⁸⁵ Berge (2018: 21).



given the potential to profit from future resource exploitation opportunities⁸⁶. As described:

“when the most valuable uses become hydropower, commercialised hunting, and the development of holiday cottages, those who only have timber and grazing rights are unable to capture the value of these new uses. The landowner, who holds the remainder, is able to capture the value of new uses. When this owner is the local commons, they can be forward looking and make plans for the future. When the local community doesn’t own the remainder, they get left behind and frustrated”⁸⁷

Where rural properties are no longer actively farmed in the state commons, the state could inherit the use rights (i.e. the share of commons from the former agricultural property), and other unused resources, therefore benefiting from income generated from renting grazing land to farmers who require a larger production area.

Declining numbers of active farmers⁸⁸, due to an increasingly urbanised population and agricultural modernisation, has led to fewer ‘commoners’ participating in the state commons. Tensions arise between active and passive farmers (i.e. relating to board participation and livelihood interests), and between large and small farms, due to their uptake of user rights in the state commons, and potential to influence board elections. Furthermore, the commodification of the outfields challenges established rights systems and the social relationships that underpin effective commons management, both within the state and community commons areas⁸⁹. With regard to the *bygdeallmenning* (i.e. community commons), there are questions arising regarding the maintenance of use rights by farmers who are halting agricultural production (i.e. who should keep these rights and for how long?), and the potential to use these rights for new activities. The possibility of allocating rights to those outwith the agricultural community, for example, the inhabitants of a village is proposed and considered a model for ‘community ownership’⁹⁰.

Ongoing municipal amalgamation in Norway may have an impact on the management of state commons, and it is believed that the ongoing review of the ‘mountain law’ (Ny

⁸⁶ Berge, E. 1995. Culture, Property Rights Regimes, and Resource Utilization. In Berge, E. and Stenseth, N.C. (eds.) Law and the Management of Renewable Resources. The University of Trondheim. ISS. Rapport nr 46.; see also Sevatdal and Grimstad (2003: 128).

⁸⁷ Hoffman, personal communication (21.2.19).

⁸⁸ Forbord, M., Bjørkhaug, H. and Burton, R.J.F. 2014. Drivers of change in Norwegian agricultural land control and the emergence of rental farming. Journal of Rural Studies 33: 9-19.

⁸⁹ See further discussion on user vs. individual rights related to outfield commodification in Rønningen, K. and Flemsæter, F. 2016. Multifunctionality, Rural Diversification and the Unsettling of Rural Land Use Systems. In: M. Shucksmith et al. (eds). Routledge International Handbook of Rural Studies. Routledge.

⁹⁰ Flemsæter (personal communication, 6.3.19).



fjellov⁹¹) is partly a response to this process of change. It is anticipated that multiple mountain boards may be appointed within larger municipality areas⁹² to accommodate strong local identities and multiple resource claims; this corresponds with historic municipality amalgamation processes⁹³. Nonetheless, there is a shift from a local, rural, focus to a larger scale governance system, with a growing urban population in Norway. Climate change may bring new opportunities for cultivation and commodification of land resources in the state commons that will require careful consideration to ensure fair and equitable distribution of use rights.

The tension in the state commons between central power and local community control persists. However, key informants assert that the commons in Norway are not archaic or stagnant, despite their ancient origins, but are adaptable to modern challenges. Indeed, they may be more important now than previously, due to the increasing need to manage public goods across the landscape scale (e.g. wildlife management, recreation, or hydro-power, which could be inhibited where the commons are subdivided into individual private parcels)⁹⁴.

⁹¹ Noregs offentlege utgreiingar (NOU) 2018: 11 'Ny fjellov'. See: <https://www.regjeringen.no/contentassets/d0f1c24601df431aac0045b72520c81e/nn-no/pdfs/nou201820180011000dddpdfs.pdf>

⁹² Frisvoll (personal communication 24.3.19)

⁹³ "In the 1975 revision of the act on mountain commons (Stortinget 1975) the rights of the population of the local community were upheld even if the definition of the boundaries of the local community had become problematic due to the amalgamation of municipalities" Berge (2018:15).

⁹⁴ Hoffman, personal communication (21.2.19).



Annex 5: France – Municipal management of collective ownership structures

History and policy/current governance context

The main disjuncture in forest landownership in France occurred following the French Revolution (1789 – 1799), where land previously held by the monarchy was allocated to private owners and municipalities. Commons were established with rural inhabitants, in order to re-establish forest land that had been over-exploited for fire-wood and as grazing prior to the revolution. There is a core distinction between forest land and ‘other’ land, i.e. rural lands, farm land, etc).

In 1827, the first ‘Forest Code’ was created by the French Government⁹⁵, which distinguishes between public/state-owned or private forest. Primarily, the Forest Code is concerned with the protection and control of forest activities, and more recently, focussing on the production of quality wood products and sustainable forest management⁹⁶. There has been little change to the basic principles of the Forest Code since this period and it remains a mandatory, legal framework. The Code therefore requires a forest management plan for private, state and municipal forest land; this is supervised by the ‘Forest Office’ (*Office national des forêts*; established in 1964) for the public and municipal forests⁹⁷. Along with the state-owned forests, municipal forest ownership is managed by the ‘public forest officer’. In 2001, a new ‘Forest Law’ was passed in France, which introduced the expectation of forest owners to implement multi-functional forest plans, including responsibilities for providing access and environmental protection.

The mechanism(s) of ownership/tenure

In 2012, the ownership of forest land in France was predominantly under private ownership (12.3 million ha; 75% of a total 16.4 million ha), with 10% under state ownership (*Forêt domaniale*) and 15% owned municipalities (*Forêt communale*)⁹⁸. Within the categories of private and state forest landownership, there are a range of ownership models and governance outcomes; these are summarised in Table 10.2.

⁹⁵ There also exists a ‘Civil code’ and a ‘Rural code’, which concerns all other land use, including agriculture, as well as an ‘Environment code’, the latter created in the 1970s.

⁹⁶ <http://www.fao.org/forestry/country/57479/en/fra/> (last updated: April 2004; accessed: 22.2.19).

⁹⁷ The ‘National Centre for Forest Owners’ (CNPf - *Centre national de la propriété forestière*) has supervised private forest management since its establishment in 1963.

⁹⁸ IFN, 2012 in Deuffic et al. (2015:1).



Table 10-2: Range of ownership experiences

Type of ownership/commons		Landownership	Use rights/governance
Private	Individual (<i>personne physique</i>)	An individual with at least 1ha of woodland	Managed according to owner's interests (i.e. full rights), within limits of law and forest regulations.
	Joint estate (<i>communauté matrimoniale</i>)	Common owners of a forest property following marriage	Management unit may be increased in scale when a joint estate is established. An example includes a post-wedding land purchase that is considered 'joint' whilst pre-marriage ownership remains in individual ownership.
	Indivisible property and Co-ownership (<i>indivision et copropriété</i>)	Landownership is shared by many individuals through egalitarian inheritance	The property remains intact on inheritance, which means that owners do not have 'specific, personal, and integral' rights. Management is a shared responsibility, which can be increasingly complex on generational succession.
	Forest group (<i>groupement forestier</i>)	Ownership is held by a forest property company; each forest owner (or investors) contribute their individual property (or financial capital) in exchange for shares in the company.	The forest estate is managed collectively through the company, avoiding fragmentation on inheritance. Heirs can sell their shares if they wish not to inherit their forest property.
	Forest property investment company (<i>société civile immobilière</i>)	Ownership as 'forest group', but integrating other types of non-forest assets (e.g. buildings)	Managed collectively through the company structure, as 'forest group'.
Public	State public forests (<i>forêts domaniales</i>)	State-held land, which may be considered 'private'. The state cannot sell land without agreement by the French national parliament.	State public forests are accessible to the wider public. Forest management is delegated to the ' <i>the Office national des forêts</i> (ONF); the joint authority of the environmental and ministry of agriculture and forest.
	Municipal forests (<i>Forêts communales</i>)	A type of property considered 'private' and held by the communes.	'Town councillors' (i.e. commune) decide management plans/priorities; daily management is undertaken by the ONF, who implement the management plan.
	Local commons forest area (<i>Biens et forêts sectionnales</i>)	Specific to the Massif Central; forest land owned by the hamlet inhabitants.	Forest managed according to same legal structure of municipal forests.

Source: Deuffic et al. (2015:12-13)



Across the different regions of France, the balance of private forest ownership varies in comparison to public or communal ownership. Two types of public ownership are of particular interest:

(i) Since 2014 it has been possible for forest owners to create a 'Forest Economic and Environmental Interest Grouping' ('GIEEF': *Groupeement d'intérêt économique et environnemental forestier*)⁹⁹. This was established as a tool to recognise initiatives to make bigger forest units, although without transferring landownership. Where there is joined forest plan, the owners can decide together which plots should be thinned/cleared, thus avoiding heterogeneous management. The groups must be minimum of 300 ha in size, or 100 ha and involve at least 20 people. This type of grouping provides tax relief and enhanced subsidies, opportunities for dialogue and knowledge exchange, as well as economy of scale benefits, for example in hiring forest contractors. For example, forest owners who are members of an officially recognised GIEEF can gain benefits similar to those provided to members of producer organisations under the forest investment tax incentive scheme ('DEFI'), including a tax credit for the work and contract aspects of the 'DEFI' scheme, where they remain a member for the next four years¹⁰⁰. It is also possible, depending on the regional administration where the GIEEF is located, that these forest grouping entities can benefit from increases in the allocation of public subsidies/aid, whether national or European¹⁰¹.

(ii) A specific type of older common from the Massif Central (a '*Section*') gives authority to the inhabitants of the local hamlet, where they are resident for a minimum of 6 months. Supervision is provided by the ONF, adhering to the rules of the municipality, and providing coordination between all different types of owners.

Extent and process of community control

Within the structures of public sector forest landownership in France, the opportunity arises for local communities to participate in forest land management. The municipal council is elected by local inhabitants; subsequently the municipal council finalises the forest plan, with the technical forest plans created by the forest officer. The Forest Law in 2001 introduced the Charter for Forest Territory (CFT) – a tool created to embed people into decision-making and to discuss forest management at the local/landscape scale. Through the Charter, all local inhabitants and stakeholders are invited to discuss

⁹⁹ See the information leaflet available here: <https://agriculture.gouv.fr/plaquette-gieef-une-mesure-de-la-loi-davenir-pour-la-foret-privee>

¹⁰⁰ An income tax credit of 25% is offered to GIEEF members (rather than 18% for individual owners) within the DEFI scheme, where those receiving the tax credit must commit to GIEEF membership until the end of the fourth year following completion of the forestry work (see: <http://mesdemarches.agriculture.gouv.fr/demarches/proprietaire-ou-operateur/demander-une-aide-economique/article/constituer-un-groupeement-d-interet>

¹⁰¹ As described: <http://mesdemarches.agriculture.gouv.fr/demarches/proprietaire-ou-operateur/demander-une-aide-economique/article/constituer-un-groupeement-d-interet>



public forest management, seeking to agree a document, recommendations and/or actions, for example, to improve recreation in the forest, create new forest roads, etc. The CFT is considered by key informants as a ‘good tool of governance’, involving active participation of many French forestry/community organisations, and therefore supporting democratic forest ownership. This document also facilitates and regulates tensions in land use planning and forestry regulations, in attempting to organise dialogue between different stakeholders. In reality, however, the main stakeholders who participate in discussions continue to be technical actors, and not citizens. There is a need to generate interest amongst inhabitants to enhance their participation; and in response, the CFT has been elaborated in some regions.

Key challenges and future directions

Forest ownership in France adheres to strong private property rights¹⁰². Ownership has not been contested since the French Revolution, although the problem of land fragmentation persists. Private forest owners have a lot of power in the Forest Code, and can refuse to participate in the common actions, for example, prioritising timber production and future legacies. Many people now seek forest ownership as an investment, as well as an asset for carbon emissions, fuel, etc. The question arises regarding how well policy will fit with the financialisation of forest land, considering management (i.e. governance), and how communities can collect money from different investors, e.g. banks, carbon investors? What will be the role of the state in forest management in the future? It is suggested that municipal forest owners and the French Forest Office will require a readjustment to their economic model and focus more on timber production. Furthermore, it is noted that forest expertise is not only a public affair and may be considered a new type of market activity (e.g. incorporating private expertise).

¹⁰² See: Nichiforel et al.(2018)



Annex 6: Europe – Common property regimes in forests

Forest ownership in common property regimes (CPRs) exists in many European countries and in various forms, including traditional commons with a more or less unbroken history of 500 years or more (e.g. Austria, France, Italy, Romania, Slovenia, Spain and Switzerland). More than 10% of all public forests in Europe are in municipal ownership. Although it may be argued that these are a sub-category of public ownership (or even seen as in private ownership in some countries), municipal forests are often claimed to be distinct because of the closeness of the management (communes) to the multiple local beneficiaries (citizens).

In Austria, for example, recent legislation has sought to clarify ownership and use rights, of forest lands, where the municipality holds the property rights, and local agricultural communities have use rights¹⁰³. As an outcome of land reforms in the 18th and 19th centuries, community-owned or community-managed forests were also established in some countries (e.g. Poland, Hungary, Slovakia, Sweden and the UK). Portugal provides an example where communal forests are owned by local communities and can be managed directly by the community ownership body, or co-managed with local public administration (e.g. State authorities)¹⁰⁴.

Because interest groups across Europe tend to exist primarily for state forests and private/family forests, less common types of ownership, such as municipal or community forests, are hardly represented in policy processes at national or European levels. This is notable as community and municipal forests may be relevant in particular for providing multiple ecosystem services and offering forest-use opportunities, such as recreation, wild food, health and social benefits for wider groups of people¹⁰⁵.

¹⁰³ Weiss, G. et al. (2015). [Forest land ownership change in Austria](#).

¹⁰⁴ Feliciano, D. (2015).

¹⁰⁵ Weiss, G. et al. (2015). [Changing forest ownership in Europe – main results and policy implications](#).



Annex 7: South Africa – Communal land tenure and municipal commonages in South Africa

History and policy/current governance context

Property regulation in South Africa and Scotland shares similar characteristics, as both are mixed legal systems¹⁰⁶. However, South Africa's contemporary land reform is closely related to the reform of its Constitution, which in turn was tied to its peaceful transition away from apartheid (and related discriminatory rules) in the 1990s as a modern Rainbow Nation which respected the layers of communities present in the country whilst recognising past injustice¹⁰⁷. South Africa's land reform is also embedded in legal pluralism influenced by both Roman-Dutch law¹⁰⁸ and (increasingly) African customary law. While Roman-Dutch law emphasises private individual ownership (in a manner similar to Scots law), the customary law is more inclined with communal forms of property¹⁰⁹.

Of particular relevance to land matters in South Africa is section 25 of the Constitution, which is the property clause. This begins by placing restrictions on when property can be subject to strict control or expropriated, with a re-allocation of ownership only being possible with proper compensation and where this is for a public purpose or in the public interest. This is similar to the position in Scotland in terms of Article 1 of the First Protocol to the European Convention on Human Rights, which protects the peaceful enjoyment of possessions, but divergence is apparent as the South African Constitution then states “the public interest includes the nation's commitment to land reform”. Land reform then includes three sub-programmes:¹¹⁰ i) Broadening *access to land* (redistribution) (s. 25(5)). [In recent years the starting point for this would be “willing buyer, willing seller”, but as noted below the speed of the reform process has led to a degree of cynicism with this approach in some quarters. That being said, some measures – including those which pre-date the land reform programme ushered in by the Constitution settlement,

¹⁰⁶ See Zimmerman, R., Visser, D. and Reid, K. (eds) (2004). *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press). Notably, in a chapter in that study Professor Kenneth Reid and Professor Cornelius van der Merwe observed that in a particular land reform context a comparison on these matters highlighted “difference and not similarity”: van der Merwe and Reid (2004) 637-670. It seems fair to note South Africa's reform, and the politics and demographics underpinning it, are linked to a more profound constitutional moment than anything experienced in contemporary Scotland.

¹⁰⁷ Pienaar, J.M. (2014). Land Reform 165-166; Chapter 5, for the constitutional dimension of the South African land reform programme. (Juta 2014).

¹⁰⁸ Carey Miller, D. L., and Pope, A. (1999). *Land Title in South Africa* (Juta 1999).

¹⁰⁹ Pienaar, J.M. (2018) “Customary Law and communal property in South Africa: challenges and opportunities” in Xu, T. and Clarke, A. (eds) *Legal Strategies for the Development and Protection of Communal Property* (Oxford University Press 2018) 127-151.

¹¹⁰ Pienaar (2014) chapters 7-9.



might continue to play a role, such as the Provision of Land and Assistance Act 126 of 1993 (which has a role in relation to commonage)¹¹¹.]; ii) Make tenure and land rights more secure (*tenure reform*) (s. 25(6)). [This might bring challenges for developing commonage: commonage itself is discussed below.]; iii) Restoring lost land and land rights (restitution programme) (s. 25(7)).

Other aspects of the constitution may also be important to community rights: for example, a recent law on communal landownership – the Communal Land Rights Act 11 of 2004, which would have been relevant to a land area where over 18 million people live – was struck down by the Constitutional Court because parliamentary process as mandated by the Constitution had not been properly followed. (Equivalent replacement legislation has not yet been enacted, although a Draft Communal Land Tenure Bill was published for comment on 7 July 2017, meaning affected land has not yet been formally transferred into community ownership.) Also particularly important in this context is the constitutional protection of culture, which may be particularly relevant in certain rural areas.

It is also worth noting that certain other aspects the South African Constitution may be relevant, including Section 30 (right to culture) and Section 31 (right to be part of a cultural community). There is no direct analogy for such South African provisions in the blackletter provisions of Scots property law.

Moving away from the Constitution, a particular relevant focus is municipal commonage. Presently two broad categories of ‘commonages’ may be distinguished: commonages before 1994 and commonages after 1994¹¹² when the new political dispensation commenced. The former category comprises ‘old’, ‘existing’ and ‘traditional’ commonages, which consist of ‘land found adjacent to small towns that was granted by the state (mainly in the 1800s during the formal establishment of towns) for the use and benefit of the residents’¹¹³. Commonage land was intended for use by the inhabitants of a particular town for grazing or other agricultural purposes. Post-1994 commonages relate to ‘new’ commonages, which consist of land purchased by the former Department of Land Affairs, now known as the Department of Rural Development and Land Reform, through the Provision of Land and Assistance Act 126 of 1993, to either create a new commonage or expand an existing commonage, as part of a national land redistribution

¹¹¹ van der Merwe, C. G., Pienaar, J. M., and de Waal, M., (2015). “South Africa” in Verbeke, A. and Sagaert V. (eds), *International Encyclopaedia of Laws: Property and Trust Law* (Kluwer Law International) paragraphs 1052-1053.

¹¹² 27 April 1994 is a watershed date for South Africa as the first free elections were held on that day, paving the way for a constitutional democracy.

¹¹³ Davenport, N. A, Gambiza, J. (2009) “Municipal Commonage Policy and Livestock Owners: Findings from the Eastern Cape, South Africa,” *Land Use Policy*, 26 (3), 513–20.



programme¹¹⁴. Access to commonage is essentially use rights. The new dispensation now requires that land also be used in the “*public interest or if the plight of the poor demands it*”.¹¹⁵ Although vast tracts of land are still in municipal control and in theory available for redistribution purposes, much of the land is tied in long-term leases to the benefit of established commercial farmers¹¹⁶.

The mechanism(s) of ownership/tenure

Despite the (re)emergence of customary rights in land, it is fair to say that in much of South Africa the apex right of ownership retains its strategic position in many settings and contexts, albeit it can be systematised or constitutionalised¹¹⁷ as necessary, when matters such as ongoing occupation of land as a home or freedom of expression or establishment rub against that right¹¹⁸. Meanwhile, even with new juristic forms for ownership of land (such as the communal property association), there may still be governance challenges for those who have not traditionally been involved in decision-making (which could have a gender dimension).¹¹⁹ Looking specifically at commonage, there are some problems in governance terms. First, there is a self-governance problem. For example, although a large number of both old and new commonage farmers are aware of a local livestock owners’ association (LOA), “local institutions were weak in terms of membership especially amongst the old commonage farmers whose LOA membership was almost half that of the new commonage farmers”.¹²⁰ This raises a question about how to encourage farmers to actively participate into associational life and commonage management. (Certain analogies with the management of common grazings in crofting areas might be ventured here).

Second, local government’s management capacity is weak, and one of the reasons is that the municipality does not function well in agricultural management and lacks the relevant capacity¹²¹. This calls for the development of ‘adaptive co-management’ which refers to “flexible community-based systems of resource management tailored to specific places and situations and supported by, and working with, various organizations

¹¹⁴ Pienaar (2014)

¹¹⁵ H Mosert, JM Pienaar and J van Wyk J “Land” in Law of South Africa Vol 14 (LexisNexis) 2010 para 57.

¹¹⁶ JM Pienaar (2014)

¹¹⁷ van der Walt, A.J. (2011) *Constitutional Property Law* 3rd edn (Juta 2011).

¹¹⁸ Consider: van der Walt, A.J. (2014), “The Modest Systemic Status of Property Rights”, *Journal of Law, Property, and Society*, 1 (2014), 15–106.

¹¹⁹ van der Merwe, Pienaar and de Waal (2015) paragraph 1093.

¹²⁰ Davenport and Gambiza (2009) 517.

¹²¹ Davenport and Gambiza (2009) 518-19.



at different levels”¹²². Anderson and Pienaar argue that personnel and management structures should be in place with clearly defined status and responsibilities¹²³.

Finally, local institutions supporting commonage management are often poor, including poor access to credit, markets and technology, as well as the existence of complex legal systems. Atkinson argues that ‘creative institution-building programmes can overcome the various dualisms within South African agriculture-bringing together small-scale and large-scale farmers, individual and collective farmers, and subsistence and commercial farmers’¹²⁴. Various local institutions need to support different tenure options and types of farming whether it be subsistence or commercial.

There is also one further issue that impacts on commonage and its potential to broaden access to land specifically, namely that large portions of commonage are locked in long-term leases, perhaps thirty years and in some cases even longer. This means that land is not available for redistribution purposes given the duration of long-term leases.

Extent and process of community control

Various actors, including traditional leaders and authorities, play a role in governing communal property¹²⁵. Due to historical reasons, different indigenous communities were allocated specific areas for occupation¹²⁶. In this context, the constitution of a community depends on both a group identity and the geographical location of that group. Cultural factors may also be relevant. Specific reference might be made to the Communal Property Associations Act 28 of 1996, which gives communities a means to associate together to hold land. This model might be deployed in circumstances where a community has acquired land under the South African land reform programme. With its focus on rules rather than form, the communal property association offers slightly more corporate governance flexibility than the community rights to buy in Part 2, Part 3 and Part 3A of the Land Reform (Scotland) Act 2003 (although the asset transfer request regime in Part 5 Community Empowerment (Scotland) Act 2015 offers a closer comparison)¹²⁷. That said, there have been some issues relating to that legislation, most

¹²² Olsson, P., Folke, C., Berkes, F., 2004. Adaptive co-management for building resilience in social-ecological systems. *Environment Management* 34, 75-90.

¹²³ Anderson, M, and Pienaar, P., (2003) [“Municipal Commonage.” Evaluating Land and Agrarian Reform in South Africa](#): An Occasional Paper Series, August 2003.

¹²⁴ Atkinson, D. (2013) “Municipal Commonage in South Africa: A Critique of Artificial Dichotomies in Policy Debates on Agriculture,” *African Journal of Range & Forage Science*, 30, no. 1&2: 29–34.

¹²⁵ Pienaar, 2018, 136-140.

¹²⁶ Pienaar, 2018, 140-142.

¹²⁷ Combe, M. M. (2006) “Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?” *Juridical Review* 2006: 195-227



notably in terms of a clash between a community and a traditional leader as to whether a communal property association was an appropriate landowning model¹²⁸.

Key challenges and future directions

Over and above existing challenges of governance, the most controversial issue at present for South African land reform is the potential reform of the constitution to allow for expropriation (i.e. deprivation) of property without compensation in certain circumstances. There are also (in the words of Pienaar) “challenges” and “opportunities” linked to, for example, legal pluralism and customary law tenure, which might involve an existing legal measure (the Interim Protection of Informal Land Rights Act 31 of 1996) being adapted for appropriate use into the future¹²⁹.

¹²⁸ See: Pienaar, J.M. (2017) "[The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land](#)" PER / PELJ 2017(20).

¹²⁹ Pienaar (2018), p.147-148.



Annex 8: Germany – Municipal landownership and administration

History and policy/current governance context

Germany is home to about 81 million people who live in 16 federal states. The non-profit sector has a long tradition in Germany and it takes on greater significance for society, politics and economy than in many other countries. Common land use also has a long tradition in some parts of the country and is practiced on about 2.4% of the forest area¹³⁰.

Municipalities in Germany are the lowest level of public authority, ranking after the 'Land' (state) and 'Kreis' (district). There are a total of just over 12,000 municipalities in Germany, 108 of which are municipalities with city status. Berlin and Hamburg each have one municipality. In Germany, individuals are generally better and more democratically represented than in Scotland due to governance at the municipal level and the existence of a municipal council ('Gemeinderat') in villages and smaller communities. These municipal councils have significantly more power and financial resources than Scottish community councils.

In the 1990s/early 2000s, the sale of public utilities and property was seen as a means to reduce public debt for some municipalities, as well as tackle the general perception of public ownership as unaccountable, inflexible and prone to corruption¹³¹. The vast majority of public land was sold to private bidders on the open market. More recently, there has been growing concern about the need to change how public land is owned and administered, particularly in the current context of high demand for land and affordable housing in urban areas.

The mechanism(s) of ownership/tenure

'Community ownership' in Germany does not exist as in Scotland and elsewhere, however initial discussions have recently begun about Community Land Trusts in Berlin. Following liberalisation of housing companies in the early 1990s, public housing stock in Germany is continuously shrinking. Housing co-operatives are prevalent, with 1,800 co-operatives holding approximately 2.1 million dwellings (10% of the housing stock) between 2.8 million members¹³². The members do not own the dwellings, but shares of

¹³⁰ Koch, M. and Maier, C. (2015). [Forest Land Ownership Change in Germany](#). COST Action FP1201 FACESMAP Country Report, European Forest Institute Central-East and South-East European Regional Office, Vienna. 35pp.

¹³¹ Becker, S., Naumann, M. and Moss, T. (2017). [Between coproduction and commons: understanding initiatives to reclaim urban energy provision in Berlin and Hamburg](#). *Urban Research and Practice*, 10(1), 63-85.

¹³² See: <https://www.housinginternational.coop/wp-content/uploads/drupal/The%20German%20Co-operative%20System%202016.pdf>



the cooperative usually relate to the size of the dwelling. The closest comparator to 'community ownership' of buildings in Germany are the 'Mietshäuser Syndikat' (apartment house syndicate) projects and initiatives. They operate on a very small scale (currently 140 house projects and 20 other initiatives¹³³) and allow groups of people to establish a small housing association to jointly purchase property. Negative opinions from politicians of community ownership or non-market forms of housing provision have perhaps stifled the development of community models. Such scepticism may be rooted in scandals in the subsidised housing sector in the 1980s, the socialist past of Eastern Germany, or the tradition of German economic governance, which is characterized by a market-promoting policy by a strong state and which can be understood as a specific German neoliberal trajectory.

However, municipalities in Germany's towns and cities adopt a range of policies relating to the ownership and management of public land, several of which have received considerable public and political attention. Berlin and Hamburg, for example, have become important sites of a local 'Right to the City' movement, which has resulted in a number of protests and collective actions around issues of housing and urban development¹³⁴.

It is important to note that the approach to municipal land varies significantly between municipalities and federal states, and often depends on the relative 'wealth' of the municipality. Those municipalities with financial debt are less able to implement creative ways to administer/manage their assets.

Extent and process of community control

The extent and process of community involvement in decisions relating to municipal land/buildings varies between states and municipalities. Some key approaches in towns/cities which are relevant to community/collective management are considered below.

The 'concept approach' ('Konzeptverfahren')

In Hamburg and Frankfurt, the municipalities have attempted to empower communities to buy public land. When land or building(s) become available, individuals are invited to form groups and submit a 'concept' to the municipality. The group's concept must demonstrate their financial ability to buy and manage the land/building(s) collectively and they must also demonstrate the social impact of the proposed project. There are no strict requirements with regards who can apply. In Frankfurt and Hamburg, groups may

¹³³ https://www.syndikat.org/en/joint_venture/

¹³⁴ Becker et al. (2017).



register their interest in a project so that they are informed if a purchase opportunity arises.

Because of Berlin's socialist past, there was a large amount of publicly-owned land in the eastern part of the city. Following reunification in the 1980s, the municipality valued its land assets and then sold the majority on the open market to private buyers¹³⁵. In 2009, a political decision was made to change how public land in the city is administered, and this eventually led to a change in policy in 2015. However, there was not much public land remaining at this time. Today, attempts are being made to develop mechanisms for people to apply for land/housing that is owned publicly, using a similar 'concept approach'.

A planning-oriented approach

In the smaller cities of Freiburg and Tübingen, municipalities have adopted a planning-based approach to administering public land. In Freiburg, up to 10% of the proposed development area must be transferred to ownership by the city for subsidised housing construction. Without this, planning permission is not granted. If the developer decides not to include the 10%, or if it not possible for some reason, 50% of the newly created floor space (m²) must be used for subsidised rental housing¹³⁶.

In Tübingen, a more radical approach allows the development of building land in the 'interim purchase model'. The municipality purchases land and assigns appropriate planning permission(s). Private developers then have the opportunity to buy land within the requirements of the planning permission already approved¹³⁷. With this approach, the municipality controls development via the planning permission process and its 'interim' ownership to ensure control over social housing and limit the amount of housing sold at or above market value.

Also in Tübingen, the current mayor has recently warned around 450 owners of vacant properties that if these properties are not developed in the next four years the municipality will buy them for the current market value via compulsory purchase order, for housing purposes. If these landowners refuse either to develop the properties or to sell to the municipality, they will have to pay financial penalties. To enact this, the mayor is employing the pre-existing Building Code, which is part of the Federal Building Code, which is generally not used because of concerns related to respecting individual property rights¹³⁸.

¹³⁵ <https://blogs.hu-berlin.de/wohnenberlin/2015/11/18/neue-liegenschaftspolitik/>

¹³⁶ <https://www.freiburg.de/pb/,Lde/435150.html>

¹³⁷ Schaller, S.F. (2018). Public-private synergies: Reconceiving urban redevelopment in Tübingen, Germany. *Journal of Urban Affairs* 3, pp. 1–20.

¹³⁸ <http://www.taz.de/!5577403/> ('Create living space in Tübingen').



Remunicipalisation

Remunicipalisation generally refers to the establishment (or re-establishment) of public services owned by the local state. This generally involves either: (1) the municipality buying back infrastructure and gaining the economic benefits from that directly; and (2) restoring public ownership with clear aims for local communities – ‘democratic, socially just, ecologically oriented systems’.

Remunicipalisation is significant as it often reverses previous privatisations in the public sector, involving new actors in public service provision and opening up new governance pathways¹³⁹. In Berlin, there is growing pressure to ‘municipalise’ housing stock, with political discussions in the capital focusing on the realignment of Berlin’s real estate policy with land in public ownership. There is also a growing trend to remunicipalise public services such as energy, water and other infrastructure to bring services into municipal/collective control.

Key challenges and future directions

The ‘concept approach’ has been criticised for lacking transparency in terms of how decisions are made about applications, as well as for favouring wealthier, educated individuals¹⁴⁰. The model tends to address the needs of these social groups more than less wealthy individuals who require access to social housing.

The aims of municipalities can be impeded by the ‘Land’ (state) and ‘Kreis’ (district), which also have ownership rights in some places. In Frankfurt, for example, where the sale of public land is no longer allowed due to a paucity of remaining holdings, a large area in the centre of the city is owned by the Land, who are selling it privately to investors. The municipality has no power to intervene. Similarly, across Germany, the federal landowning agency is selling land and the municipalities cannot act to stop this.

It is also worth noting that there is a vibrant community renewable energy sector in Germany, with very high public acceptance of wind farms and lots of opportunities for communities to take on ownership of renewable energy projects. While not directly of relevance when considering community models of *landownership*, there remains potential for Scotland to learn lessons from the German community renewable energy model.

¹³⁹ Bönker, F., Libbe, J. and Wollman, H. (2016). [Remunicipalisation revisited: long-term trends in the provision of local public services in Germany](#). In: Wollman, H. et al. (eds.) *Public and Social Services in Europe: from public and municipal to private*. Springer.

¹⁴⁰ Mössner, S. (2016). Sustainable Urban Development as Consensual Practice: Post-Politics in Freiburg, Germany. *Regional Studies*, 50 (6), pp. 971–982.



Annex 9: USA – Community Land Trusts

History and policy/current governance context

Provision of affordable housing through market interventions has an established history, with Parish Land Trusts (in the 17th and 18th Century) and Garden Cities in the UK, and Indian Gramdan movements, all emphasizing communal ownership and holding land in trust for community benefit¹⁴¹. These initiatives provided inspiration for the community land trust model, which emerged in the US following the civil rights movement in response to a recognised need to create opportunities for African Americans to secure affordable homes and become more economically independent. The focus initially was in the rural south, with the first community land trust established in 1969 as a farm collective in Georgia (*New Communities Inc.*), with the aim of helping African-American farmers gain secure access to farmland. However New Communities Inc. was burdened from the outset by the debt incurred from the land purchase, with the bulk of revenues going towards paying off this debt, and further CLTs were initially slow to emerge¹⁴².

The Institute for Community Economics (ICE) in the US refined and extended the CLT model in the CLT Handbook in 1982 and in 1992 the concept was enshrined in federal law¹⁴³. These developments led to increased awareness of the potential of the model to provide affordable housing for disadvantaged communities, with greater numbers of CLTs emerging from the 1990s onwards, influenced by an increasingly favourable policy and funding environment and increased knowledge transfer between CLTs¹⁴⁴. Prior to the 1980s CLTs had emerged predominantly in rural areas, with an increasing shift towards urban areas from the 1980s, in response to the increasing need to counteract rapidly rising house prices¹⁴⁵. CLTs were also established to address high vacancy rates, neglect and severe downturns in the condition of specific neighbourhoods, with an emphasis in all cases on establishing community control to avoid residents losing their homes or being unable to afford homes¹⁴⁶. Housing affordability continues to represent a major challenge, with rents increasing across the US, rental vacancy rates

¹⁴¹ Diacon et al., (2005) [Redefining the Commons; Locking in value through Community Land Trusts](#). Building and Social Housing Foundation.

¹⁴² See the [Roots and Branches](#) website for a detailed history of the CLT movement.

¹⁴³ Key CLT features have been defined since 1992 under [Section 213 of the Housing and Community Development Act](#).

¹⁴⁴ Davis, J. E. 2010, [The Community Land Trust Reader](#) (Lincoln Institute of Land Policy).

¹⁴⁵ Gray, K. (2008) [Community land trusts in the United States](#), *Journal of Community Practice*, 16 (1), pp. 65–78.

¹⁴⁶ Axel-Lute, M. and Hawkins-Simons, D. (2015) [Community Land Trusts Grown from Grass Roots](#). Land Lines, July 2015, Lincoln Institute of Land Policy.



at historic lows and house prices having risen beyond affordable levels for many home buyers (e.g. in Washington median home values tripled during 2000-2013)¹⁴⁷.

Coupled with stagnant wages over the same time period in many cities and a failure of existing social housing initiatives to provide housing which retains affordability long term, these factors have led to CLTs becoming more established as a delivery model for permanently affordable housing in US towns and cities, with over half of the more than 250 CLTs in the US having been created since 2000¹⁴⁸. Local government has been an important influence on the growth of CLTs, playing a role in the formation of 44% of all CLTs formed in the 2000-2010 period, with public funding used in over half of all CLTs formed between 1990 and 2006 (either to support land purchase or housing), a shift from early CLTs in the 70s and 80s which mainly relied on private funding¹⁴⁹.

To facilitate knowledge sharing and collective action, the Community Land Trust Network was established in 2010, with the Network merging with the Cornerstone Partnership in January 2016 to form the Grounded Solutions Network¹⁵⁰. In 2017, the network had 200 members (56% of which identified as CLTs, with other members including other organisations, individuals and government) in 41 states, with the majority of CLTs having less than five staff, with a quarter having more than five¹⁵¹. The members with housing (128) stewarded over 85,000 units, with over 19,000 of these comprising homeownership units and the remainder a mix of co-operative housing and rental units. A 2015 survey of the CLT Network identified that half of the CLTs were property developers in their own right and around three quarters identified themselves as predominantly urban, with the remainder in rural areas or small towns¹⁵².

The mechanism(s) of ownership/tenure

CLTs in the US can vary in terms of their legal structure, scale of operation (e.g. neighbourhood, city, county, multi-county, state), the focus of their activities and their degree of reliance on state or federal assistance¹⁵³. Nevertheless, most CLTs share a number of characteristics, commonly including an open membership (from within their geographically defined community area). The 'classic' CLT follows a tripartite board structure, with representatives of the defined community area making up a third of the

¹⁴⁷ Joint Centre for Housing Studies. (2015) [State of the Nation's Housing 2015](#). Harvard University.

¹⁴⁸ DeFilippis, J. Stromberg, B. and Williams O.R. 2018, W(h)ither the *community* in community land trusts?, *Journal of Urban Affairs*, 40:6, 755-769.

¹⁴⁹ Miller, S.R. (2013) Community Land Trusts: [Why now is the time to integrate this housing Activists' tool into local government affordable housing policies](#). *Zoning and Planning Law Report*, Vol. 36 No. 9.

¹⁵⁰ See <https://groundedsolutions.org/>

¹⁵¹ See [Grounded Solutions 2017 Members Report](#)

¹⁵² See 2015 [Community Land Trust Network Members Report](#).

¹⁵³ See Meehan, J. (2014) [Reinventing Real Estate: The Community Land Trust As a Social Invention in Affordable Housing](#). *Journal of Applied Social Science*. Vol. 8(2) 113-133.



board, representatives of residents of CLT housing a third, with the final third made up of wider relevant public and wider stakeholder body representatives¹⁵⁴. In the early stages CLTs lack homeowners (due to having not yet developed housing) and not all CLTs follow the classic tripartite structure¹⁵⁵. Critically, CLTs have both a housing provisioning function and, due to their nature as community bodies, an organising and empowering function for communities – both of which are of key importance.

CLTs represent not-for-profit community controlled organisations which use a dual ownership model. This involves the CLT acquiring land with the aim of developing and selling (and in many cases renting) housing to lower income households, with the CLT using a long term ground lease model to retain ownership of the land and ensure the housing remains permanently affordable. Home owners can gain a limited amount of equity but are required to agree to resale price restrictions to maintain the affordability of the homes for future owners and the CLT commonly retains a long term option to repurchase the homes at a formula driven price if the homeowner decides to move¹⁵⁶. The Burlington Community Land Trust (BCLT) (founded in 1984) for example, provides low-income residents with subsidies to support them buying their own homes (and leasing the land long term), with homeowners receiving 25% of the increased equity upon the sale of their home, with the trust receiving 75%, which is used to maintain the affordability of the home.

Some CLTs have developed alternatives to the ground lease model, with Chicago CLT (a citywide CLT set up in 2005), using 99 year restrictive covenants. These agreements place restrictions on homeowners and require that units be sold to income qualified buyers at an affordable price, used as their main residence and acquired with low risk mortgage products¹⁵⁷. The restricted covenant model avoids the challenge for CLTs of retaining ownership of the land and avoids the perception of second class homeownership associated with ground leases, although in practice CLTs employing this model have faced difficulties in maintaining long term affordability relative to the ground lease model¹⁵⁸.

Much of the expansion of the CLT sector is attributable to the adaptability of the model to a wide range of circumstances and scales of activity¹⁵⁹. The CLT model has been successful in delivering affordable housing at local levels, with loans on CLT homes also less likely to foreclose, with sub-prime mortgages in the US having a foreclosure rate thirty

¹⁵⁴ Davis (2010).

¹⁵⁵ See 2015 [Community Land Trust Network Members Report](#).

¹⁵⁶ Davis, J.E. and Jacobus, R. (2008) [The City-CLT Partnership](#). Lincoln Institute of Land Policy.

¹⁵⁷ See https://www.chicago.gov/city/en/depts/dcd/supp_info/chicago_communitylandtrustforbuyers.html

¹⁵⁸ Miller (2013).

¹⁵⁹ Davis (2007).



times higher than mortgages on CLT homes¹⁶⁰. Additionally, CLTs provide stewardship for the buildings and homeowners, commonly supporting owners during purchase and resale processes, as well as increasing stability of local housing markets preventing displacement of lower income families from gentrifying neighbourhoods¹⁶¹. The CLT model allows for the 'locking in' of a single initial public subsidy for an affordable home (which may have originated from a housing programme such as the HOME Investment Partnerships Program) through the use of this funding to purchase the land and/or build the home, with the CLT model allowing the units to be kept affordable without the use of further public funding¹⁶².

New homes can become part of a CLT in different ways, including being developed as new builds (by the trust or by a subsidiary or partner organisation), through the CLT acting as a preservation purchaser of multi-unit buildings, or through the conversion of existing homes. The San Francisco CLT¹⁶³ for example, acts as a preservation purchaser when existing affordable units are at risk of being lost through sales or evictions and converts the units to CLT homes. CLTs in the US have taken an increasing role in the provision of rental housing, due to homeownership units often being unaffordable for those in the lowest income brackets. The Burlington CLT for example, began with a focus on homeownership and subsequently developed multi-unit buildings and affordable rental accommodation due to a realization that many residents in the poorest areas would not be eligible for home loans, with this shift also influenced by the availability of public funding for affordable rental accommodation under the Reagan administration¹⁶⁴. BCLT subsequently merged with the Lake Champlain Housing Development Corporation in 2006, resulting in the largest CLT in the US, with over 3000 homes, including rental apartments, co-ops and shared-appreciation single-family homes and condominiums. Due to the merger creating a more diverse housing portfolio, this has resulted in increased mobility for residents, by facilitating access to different housing 'levels' within the trust as their circumstances change over time¹⁶⁵.

CLTs in the US have also gradually began to expand the scope of their activities beyond housing into other forms of property. In the 2017 survey of the members of the Grounded Solutions Network 49 members owned some form of non-residential properties, including community gardens, business and office space, community centres and

¹⁶⁰ Ciardullo, M. (2012). [Community Land Trusts and Rental Housing: Assessing Obstacles to and Opportunities for Increasing Access](#). Masters Thesis, University of Massachusetts Amherst.

¹⁶¹ Davis and Jacobus (2008).

¹⁶² Axel-Lute and Hawkins-Simons (2015).

¹⁶³ See: <https://sfclt.org/>

¹⁶⁴ John Davis personal communication 11/02/2019.

¹⁶⁵ John Davis personal communication 11/02/2019.



educational establishments¹⁶⁶. This broadening of the remit of CLTs offers scope for broadening support networks for CLTs and engaging with the challenge of wider neighbourhood re-development and accessing a wider range of funding opportunities¹⁶⁷.

Extent and process of community control

CLTs in the US have emerged from localised bottom-up processes (e.g. communities organising in response to a decline in housing availability in their neighbourhood), or in some cases as the result of a more top down, state driven process (often as succession vehicles for publicly funded interventions), with implications for the membership and degree of local control of the organisation¹⁶⁸. Some commentators argue that CLTs in the US are in a period of transition, with the ever increasing emphasis on CLTs working in partnership with local government as delivery mechanisms for affordable housing, leading to a reduced emphasis on community control and engagement and less opposition by CLTs to municipal plans and policies¹⁶⁹. The apparent increasing 'institutionalisation' of CLTs, linked with increasing use of public funding, has resulted in CLTs emerging as more expert driven, top down initiatives, in some cases operating at large-scales in complex institutional landscapes. This approach has resulted, in Chicago and Irvine for example, in the development of citywide CLTs to preserve housing affordability, with some redefining of the CLT model, including board members being appointed by the mayor¹⁷⁰. Operating a CLT at a large scale brings challenges in terms of defining the relevant community and empowering and meaningfully involving this community, leading to a potential shift away from participative, towards representative democracy in these cases, with the resulting CLT more akin to a municipal initiative in some respects.

Despite their success, CLTs remain a little known, niche component of the US housing market and operating at larger scales allows CLTs to increase their impact on de-commodifying housing¹⁷¹. In practice, the majority of CLTs in the US remain relatively small community membership based organisations. CLTs may take differing approaches, with some grass roots community centric CLTs heavily focused on community organising aspects and some more technical CLTs focused more narrowly on delivery of affordable housing¹⁷². The importance of developing a shared community vision for the activities of the CLT are widely recognised, to ensure long term community support and ensure the CLT model is the most suitable approach to address the relevant

¹⁶⁶ 2015 [Community Land Trust Network Members Report](#).

¹⁶⁷ John Davis personal communication 11/02/2019.

¹⁶⁸ Crowe et al., 2011, [Community Land Trusts A review of urban Community Land Trusts in England. Lessons and practical advice](#). The Young Foundation.

¹⁶⁹ DeFillipis (2018)

¹⁷⁰ See https://www.chicago.gov/city/en/depts/dcd/supp_info/chicago_communitylandtrustforbuyers.html

¹⁷¹ John Davis personal communication 11/02/2019.

¹⁷² Axel-Lute and Hawkins-Simons (2015)



challenges. CLTs can also evolve their approach over time, with community organising aspects critical in the early stages to build a support base, with these aspects becoming less consuming as development progresses and the focus shifts to partnership working and becoming a housing provider¹⁷³.

Key challenges and opportunities

In terms of expansion and increasing the impact of the CLT sector a number of challenges are evident¹⁷⁴, which can be summarised as:

- **Equity and additional private/public sector funding** is key for CLTs to be able to access land, upscale their operations and close the housing provision gap. Land values continue to increase and affordable housing subsidies have declined, restricting the amount of land which CLTs can acquire. The largest housing portfolios have been achieved by CLTs when strong partnerships have been established with state and/or city government.
- **The underwriting standards of banks have become stricter over the last decade and banks have become increasingly centralised.** This consolidation of banking decision making has also reduced the capacity for communities to build relationships with lenders at local scales, with banks often unaware of the CLT model.
- **Establishing a CLT, acquiring land and developing housing is a complex undertaking which can take considerable time.** Development is high risk and CLTs are often competing with large housing corporations and land speculators.
- **As CLTs expand their activities they need to continually enhance their capacity and move beyond a reliance on volunteers.** The expansion of portfolios requires professional staff, strong networks and sharing of best practice.
- Community engagement and partnership working is essential for CLTs to ensure their support base is kept active and informed; however, the **skills required for community organising are very different to those required for development.** An overemphasis on development can also risk losing focus on community aspects. As CLTs have two constituencies (housing residents and non-resident community members), conflict can occur. Working in partnership with local government (and relying on them for funding and planning permits etc.) can also create challenges for CLTs in relation to the confrontational aspects of their community organising work.

¹⁷³ John Davis personal communication 11/02/2019.

¹⁷⁴ John Davis, Jim Oldham and Matthew Hoffman personal communication.



- CLT is often identified as a radical model, with the **inertia of society and government often requiring long timescales for innovative ideas to permeate the mainstream**. This is compounded in the US by a well-established frontier mythology of private ownership, with American society wedded to the concept of private property rights as exclusive.

Nevertheless, CLTs are continuing to emerge across the US and with a growing need for permanently affordable housing they are likely to further expand their role in the future. Developing partnerships with funders remains critical to CLTs accessing sufficient land. This requires innovative thinking, including facilitating the transfer of publicly owned assets (e.g. old schools) and other buildings (e.g. churches) into CLT ownership for development as affordable homes. Further diversification beyond housing provision also offers considerable opportunities for CLTs to engage with a wider economic development agenda. As has occurred in England, multiple CLTs have emerged within the same geography in parts of the US, with joint-working beginning to emerge in the Pacific North West, Boston, New York, San Francisco and New Orleans. These structures offer considerable scope for increasing efficiencies through pooling of resources at state/regional scales while maintaining a more localised approach at the level of individual CLTs.



Annex 10: Kenya – Provision of collective title

It is estimated that up to 60% of Kenya is made up of community lands. Most are in the dry, northern half of the country and include: ranches; land transferred to a community by an Act of Parliament; community forests, grazing areas or shrines; ancestral lands traditionally occupied by hunter-gatherer communities; and trust lands (held by county governments).

Similar to in other British colonies, 24 reserves were demarcated in Kenya in the 1920s, where native people could live and farm. In the 1930s, native people had a greater say in the control of the reserves – the lands were vested in appointed boards of trustees rather than the colonial government, and a Local Native Council. The Council had to be consulted before leases were issued from the reserves to non-native people, and land decisions were to be to the benefit of residents of the reserves. After independence in 1963, locally-elected county councils (which evolved from the native councils) continued to be the trustees of native land. The county councils had the powers to ‘set aside’ parts of the trust lands (as they were then known), which led to tribal, group, family or individual customary rights being extinguished¹⁷⁵.

The Trust Land Act of 1968 recentralised control with county councils acting at the behest of the Commissioner of Lands in Nairobi. This led to regular allocations (‘takings’) of land to non-members of native communities and forcible relocations of whole clans to allow expanding elites and influential tribes to occupy the land. Community rangelands, forests and wetlands were reallocated to farmers, co-opted by the government for disposal to private interests, or turned into local authority wildlife reserves that were controlled by the county councils.

Political discussions in the late 1990s considered the need for a new land policy so that the ownership and administration of customary lands would be vested directly in the community ‘in common’. The new National Land Policy (2009) and changes to the National Constitution (2010) declared that all land in Kenya belongs either to all the people collectively (public land), to individuals (private land) or to communities (community land). The main aim was to end the legal status of community lands as unowned and/or un-registerable. The Community Land Act (CLA) (2016) focused on how to bring community lands under formal Community Title (by documenting and mapping existing forms of communal tenure and ensuring they are governed by communities).

The CLA provides a framework through which customary holdings can be identified and registered, and this promises land security for six to ten million rural Kenyans. It prescribes that a registered community landowner may ‘allocate part of its land to a

¹⁷⁵ Wily (2018a).



member or group of members for their exclusive use and occupation for such period as the registered community may determine', but that a separate title shall not be issued for such a parcel, and 'shall not be superior to community title in any way'. The law also states that a community may convert part or all of its land into private property/properties rather than relying on use rights, providing this is agreed to by two thirds of adult community members¹⁷⁶.

Academic analysis of the CLA suggests that there are many positive attributes of the law. In particular, provision for (and registration of) community title presents a way to clarify community property that already existed via customary rights. Community title is also directly vested in communities once they register their existence – there is no need for them to create corporate entities – and they may define their memberships and make land rules with binding legal force¹⁷⁷.

However, there are some legal loopholes which place communities at risk of their lands not being as secure as was promised before the new legislation. This is mainly as a result of weak political will to apply the law and overlapping claims to land by the national and local government authorities over communities. The government has been unwilling to surrender land to communities in some places, defining land as public rather than community property. In this type of scenario, non-state actors are needed to help communities to secure their land.

Doubts have also been raised about how long it will take for the registration process to be completed, with particular criticism of the 'top down' nature of the registration process which does not allow for community-driven registration processes¹⁷⁸.

This case illustrates that legislative change is not enough on its own to secure land rights and drive social change. The assistance of non-state actors and participatory mechanisms to ensure effective allocation of community rights are also required.

¹⁷⁶ Stiftung, F.E. and Odete, C. (2016). The legal and policy framework regulating community land in Kenya: an appraisal.

¹⁷⁷ Wily (2018b).

¹⁷⁸ Rights and Resources Initiative (2012).



Annex 11: Norway – Indigenous ownership and management rights

The Sámi people are the indigenous people of Sápmi, which includes parts of Norway, Sweden, Finland and the Kola Peninsula of Russia. Traditionally the Sámi make a living from a variety of activities, including hunting, fishing, fur trapping, subsistence agriculture and semi-nomadic sheep and reindeer herding. There are approximately 40,000 Sámi people living in Norway.

History and policy/current governance context

In the 18th and 19th centuries, Sápmi was divided by Norway, Sweden, Finland and Russia. Sápmi in northern Norway covers about 40% of the country's land area. A royal decree in 1775 allowed parcels of land to be sold to settlers and in 1848 the remaining land was declared Crown land because nomads could not acquire ownership. From the late 19th century, oppression and cultural assimilation was general Norwegian policy towards Sámi people. Sámi language was forbidden in schools and Norwegian-sounding surnames were prerequisites for acquiring land titles. Reindeer management was considered a 'tolerated use'. An underlying conviction held by the Norwegian authorities and society for a long time was that reindeer herding would inevitably disappear as a result of modernisation. This marginalisation of Sámi language and culture still has a lasting influence today¹⁷⁹.

Following the UN Declaration of Human Rights in 1948, there were limited reforms. Political will in the 1950s to recognise Sámi language and culture led to a degree of cultural autonomy in the 1960s and 1970s. The Sámi became recognised as indigenous people and the Sámi Rights Committee was established in 1980. An amendment to the Norwegian Constitution in 1988 (following a crucial fight over the construction of a large dam on the Alta-Kautokeino in 1970s and into the early 1980s) recognised that the State of Norway is *founded on the territory of two peoples, the Sámi and the Norwegian*. The amendment also required the safeguarding and development of Sámi language and culture, and the Sámi Parliament was opened in 1989. In 1990, Norway ratified the International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples (No. 169). This included a requirement that central government authorities provide the Sámi people with a clear right to co-manage their lands.

In 1997, a report from the Sámi Rights Commission about rights in Finnmark county (the northernmost region where the largest number of Sámi in Norway live) enabled municipal self-governance of 'outfield areas' (unfenced areas of rough grazing, forest,

¹⁷⁹ Riseth, J.A. (2015). Restoration of Indigenous Lands in Finnmark, Norway. The Challenge of the Land Reform Process in Sápmi. Presentation at the Third International Indigenous Social Work Conference, Darwin, Australia.



moorland and mountains). The development of policy for Sápmi south of Finnmark is an unresolved, ongoing issue.

The mechanism(s) of ownership/tenure

In Norway, access to various rights of use has often been more crucial than ownership. Grazing rights across large, unfenced areas remain crucial for animal husbandry (especially sheep and reindeer herding). There is a public right of access to all land that is not in-by-land. Norwegian Sámi people have land use rights but not fixed property ownership¹⁸⁰.

Developments in case law have led to the recognition of reindeer herders' grazing rights, which are rooted in the immemorial usage of lands by the Sámi. For example, two important Supreme Court judgements in 1968 (one in Troms and one in South Trøndelag) found that the Sámi use of land and waters *for a long time had been attached to the place and that it in its core is so fastened that it cannot simply be equated with the exercise of an innocent beneficial right of use or a public access to land*. This led to the Sámi people gaining legal recognition for their rights to use their traditional hunting and fishing sites on private land in all Sámi areas in Norway.

In Finnmark, the Finnmark Act (2005) abolished the 'state lands doctrine' (whereby the Norwegian State was the owner of all 'unsold' or 'unowned' land in Finnmark without consideration of private usage or commonage rights) and transferred about 95% of the area of the county to the inhabitants. The Finnmark Estate (consisting of 45,000km² of outlying fields and mountainous areas) is owned collectively by all residents of Finnmark County and governed by a Board of six directors, appointed by the Sámi Parliament and Finnmark County Council. The Finnmark Estate is *an independent legal entity with its seat in Finnmark, which shall administer the land and natural resources etc., that it owns in compliance with the purpose and other provisions of this [the Finnmark] Act*.

The Norwegian Government and the Sámi Parliament also signed a Consultation Agreement in 2005 with the aims that: (a) there is agreement between state authorities and the Sámi Parliament when it considers introducing laws or measures that may affect Sámi interests; (b) a partnership approach is developed between state authorities and the Sámi Parliament, working to strengthen Sámi culture and society; and, (c) a common understanding of the situation and development needs of the Sámi community is developed. The Finnmark Commission was established to identify individual and collective ownership and possession rights. The Commission uses existing sources to identify land rights in Finnmark and this process (which began in 2008) is expected to

¹⁸⁰ Grimstad, S. and Sevatdal, H. (2007). Norwegian commons: a brief account of history, status and challenges. Noragric Working Paper No.40, March 2007. Norwegian University of Life Sciences.



continue until around 2025. In most cases, the Finnmark Estate is recognised as the owner and only a few local claims have been upheld. Unsolved claims are referred to the Finnmark Land Tribunal and any appealed claims at the Tribunal are sent to the Supreme Court.

The legal basis of the Finnmark Act is that the Sámi have *collectively and individually through long time use of land and water built up rights to the grounds of Finnmark*. In line with ILO Convention 169, the Act ensures that the Norwegian government takes the necessary steps to identify land which the indigenous people traditionally occupy, guaranteeing effective protection of their rights of ownership and possession.

South of Finnmark, in the counties of Nordland and Troms, the Outfield Commission has worked for several decades to decide on both boundaries and the legal nature of State lands. The rulings concerning the latter have generally been that State land is some form of State commons, but the user rights of the local communities are not true rights of commons. Conflict has occurred between the government and local communities (who are represented by farmers associations who want institutionalised local management).

Extent and process of community control

Academic analysis suggests that, after a decade of work by the Finnmark Commission, there are still no 'real collective rights' and what remains is still 'state commons'. There is the sentiment that there has been no real change since the era of state ownership of Finnmark land: there has been little influence of local people on local management and local people have still not been awarded rights beyond what is directly prescribed by the law or admitted by the Finnmark Estate. The Finnmark Commission has not recognised collective property rights related to the Sámi reindeer herders, other groups of Sámi, or other local residents. There are also concerns that Sámi people have not been well-represented in recent decisions and appeals relating to landownership rights.

Key challenges and future directions

The UN Committee on the Elimination of Racial Discrimination is concerned that, while the Finnmark Act recognizes that the Sámi have acquired collective and individual rights in Finnmark through long-term usage of land and resources, there remain significant gaps in translating this legal recognition into practice, resulting in limited recognition and protection of rights over their lands. Challenges also exist in relation to the hierarchy between Sámi law and other legal sources in cases where appeals arise. There is clear capacity to improve the Finnmark Act, to establish a process that better meets the requirements of the ILO Convention¹⁸¹.

¹⁸¹ Ravna, Ø. (2013). [The Legal Protection of the Rights and Culture of Indigenous Sámi People in Norway](#). *Journal of Siberian Federal University. Humanities and Social Sciences*, 11, 1575-1591. Ravna, Ø. 2017. [A](#)



Questions about the extent of rights to both non-renewable and renewable natural resources have not been resolved. In terms of renewables, although the Finnmark Act shows a willingness to recognise Sámi rights to lands and waters, the imprecise nature of the rules in relation to the management of the Finnmark Estate mean that actions have on occasions gone against local interests and Sámi ownership or exclusive use rights have not so far been recognised. South Sámi reindeer herders have also voiced many concerns about how ‘commodification’ (including the development of wind energy installations will affect reindeer movement patterns and habitat use, and the ongoing development of second homes/cabins). The ‘ease’ with which land use rights can be pushed aside (with or without compensation payments) to accommodate property rights is notable¹⁸².

Sámi reindeer herders across Norway encounter challenges in relation to second home development, energy production sites and conservation designations, which influence rights systems and cause land fragmentation. This can have crucial impacts on land use practices that depend on seasonality, nomadism and use rights. Sámis have been involved in many conflicts over land and grazing rights for several hundred years and they have gradually been ‘pushed back’ via the loss of land to colonisation, agricultural expansion and the development of mines¹⁸³ (the very recent conflict surrounding the approval of a copper mine in Finnmark is a case in point¹⁸⁴). South Sámi reindeer herding is now claimed by many to be on the brink of collapse, mainly due to the combined or cumulative effects of several land use pressures, including those from within the agricultural sector, land losses, land fragmentation and increasing carnivore numbers. The real issue therefore is not traditional user rights but ownership and future control of land and resources.

[Cold Rain on the Parade When the Sámi Celebrate 100th Anniversary](#). *Arctic Review on Law and Politics*, 8, 17-20. Ravna, Ø. and Bankes, N. (2017). [Recognition of Indigenous Land Rights in Norway and Canada](#). *International Journal on Minority and Group Rights*, 24, 70-117.

¹⁸² Riseth, J.A. (2017). A space for Sámi values? Sámi reindeer herding and Norwegian national parks. In: Elenius, L., Allard, C. and Sandstrom, C. (eds.) *Indigenous Rights in Modern Landscapes: Nordic Conservation Regimes in a Global Context*. Routledge. Rønningen, K. and Flemsæter, F. 2016. [Multifunctionality, Rural Diversification and the Unsettling of Rural Land Use Systems](#). In: M. Shucksmith et al. (eds). *Routledge International Handbook of Rural Studies*. Routledge.

¹⁸³ Nygaard, V. (2016). [Do indigenous interests have a say in planning of new mining projects? Experiences from Finnmark, Norway](#). *The Extractive Industries and Society*, 3, 17-24.

¹⁸⁴ See article in [The Independent](#) 15.02.19.



Annex 12: Canada – Indigenous partnerships in Alberta

In Canada, Aboriginal title is the closest right to indigenous communal property. The Supreme Court of Canada states that Aboriginal title arises from prior occupation of the land by aboriginal peoples (prior to European settlement), recognising that aboriginal rights to land exist regardless of State-made law and not as a product of modern judicial activity¹⁸⁵.

In 2015, the Liberal Party of Canada formed a majority federal government on a manifesto that included prioritising relations with and between indigenous people (First Nations, Inuit and Métis), at the same time as re-asserting global leadership in climate change action. The move away from fossil fuel based extraction toward renewable energy initiatives presented an opportunity vehicle for reconciliation efforts between indigenous people and ‘settlers’. Academic analysis suggests that, over the past 40 years, the development of renewable energy in indigenous territories has had several benefits, including: breaking free of colonial ties; moving towards energy autonomy; establishing more reliable energy systems; and reaping long-term financial benefits¹⁸⁶.

More recently, indigenous partnerships are shaping the renewable energy industry in the province of Alberta. The transition to renewable energy is supported via the Renewable Electricity Program¹⁸⁷ (REP), which is administered by the Alberta Electric System Operator to attract private investment in renewables. The second phase of the REP requires each bid to meet a ‘*minimum indigenous equity component*’ (15-25%), such as a land use agreement between the company and the community, or a community ownership stake in the project. This is to create jobs and local economic benefits, as well as provide renewable energy to indigenous communities.

An example is the proposed Chiniki First Nation solar photovoltaic (PV) farm, on federal Indian Reserve land, approximately 75km from Calgary in the foothills of the Rocky Mountains. The project development team includes the Chiniki First Nation (one of the Stoney Nakoda Nations), who have hunting rights under Treaty 7 (signed between the Canadian government and the five first Nations in Alberta in 1877). The expectation is that economic and employment benefits will flow to the indigenous community as a result of the partnership.

¹⁸⁵ Poisson, J. (2015). [Indigenous collective property: comparative study of the Canadian and the Inter-American systems](#). International Human Rights Internship Working Paper Series.

¹⁸⁶ Stefanelli, R. et al. (2018). [Renewable energy and energy autonomy: how Indigenous peoples in Canada are shaping an energy future](#). Environmental Reviews.

¹⁸⁷ [Renewable Electricity Program, Province of Alberta](#)



Annex 13: List of webinar participants

5 March 2019, James Hutton Institute, Aberdeen

Name	Affiliation	Country
<i>Remote participants</i>		
Jane Atterton	Scotland's Rural College (SRUC)	Scotland
Ian Cooke	DTAS	Scotland
Frode Flemsaeter	Ruralis	Norway
Jon Hollingdale	Community Woodlands Association	Scotland
Sandra Holmes	Highlands and Islands Enterprise	Scotland
Dirk Loehr	University of Applied Sciences	Germany
Pippa Robertson	DTAS/Aurora Planning Limited	Scotland
Kirsteen Shields	University of Edinburgh	Scotland/Borneo
John Watt	Scottish Land Fund	Scotland
Jenny Wong	Wild Resources	Wales
Ting Xu	University of Sheffield	England/China
<i>Participants at the James Hutton Institute, Aberdeen</i>		
David Adams	Scottish Land Commission/Uni of Glasgow	Scotland
Eric Baird	Glen Tanar Estate	Scotland
Graeme Beale	Scottish Government, RESAS	Scotland
Bryony L. Beck	Scottish Land Commission and UHI	Scotland
Adam Calo	James Hutton Institute	Scotland
Malcolm Combe	University of Aberdeen	Scotland
Thomas Curran	Teagasc	Ireland
Brady James Deaton, Jr.	University of Guelph	Canada
Sharon Flanigan	James Hutton Institute	Scotland
Jayne Glass	SRUC	Scotland
Shona Glenn	Scottish Land Commission	Scotland
Robin Grey	Land Justice Network	UK
Matthew Hoffman	University of Southern Maine	USA
Martin Hvarregaard Thorsøe	Aarhus University	Denmark
Catriona Knapman	Independent Researcher	Scotland
Jana Lindbloom	Slovak Academy of Sciences	Slovakia
John A Lovett	Loyola University New Orleans	USA
Megan MacInnes	Scottish Land Commission	Scotland
James MacKessack-Leitch	Scottish Land Commission	Scotland
Lorne MacLeod	Scottish Land Commission	Scotland
Calum MacLeod	Community Land Scotland	Scotland
Posy MacRae	Scottish Land Commission	Scotland
André Magnan	University of Regina	Canada
Rob Mc Morran	SRUC	Scotland
Annie McKee	James Hutton Institute	Scotland
David Miller	James Hutton Institute	Scotland
Gavin Mowat	Scottish Land & Estates	Scotland
Christina Noble	James Hutton Institute	Scotland
Emilia Noel Ptak	Aarhus University	Denmark
Juanita Pienaar	Stellenbosch University	South Africa
Katherine Pollard	Scottish Land Commission	Scotland
Sally Reynolds	Scottish Land Commission/Carloway Estate Trust	Scotland
Alison Rickett	James Hutton Institute/Fresh Start Land Enterprise	UK
Jill Robbie	University of Glasgow	Scotland
Bill Slee	Macaulay Development Trust	Scotland
Lee-Ann Sutherland	James Hutton Institute	Scotland
Andrew Thin	Scottish Land Commission	Scotland
Ken Thomson	James Hutton Institute	Scotland
Hamish Trench	Scottish Land Commission	Scotland



Annex 14: Webinar report

Introduction and aims

A webinar was held on Tuesday 5 March 2019 to discuss emerging findings and lessons for Scotland from this research with an expert group of international academics, practitioners, stakeholders, and interested members of the public. In summary, the webinar aimed to:

- Draw out implications for Scotland from international experiences of community, communal and municipal landownership.
- Interrogate international project advisors, representatives of case studies, and key informants to incorporate their knowledge and experience of other contexts, e.g. regarding the potential barriers/challenges experienced elsewhere.
- Link practitioners and researchers working on community, communal and municipal ownership of land internationally, for the purposes of transdisciplinary knowledge exchange.

Participants included members of the Scottish Land Commission staff and Commissioners, relevant Scottish stakeholders (including representatives from the Scottish Government, Community Land Scotland, Scottish Land and Estates, etc.), the international advisers to the research project, and representatives from the case studies featured in the project (where possible). Participants were located at the James Hutton Institute in Aberdeen, or joined the webinar remotely using WebEx software. This enabled a rich discussion amongst all those participating in Aberdeen and joining remotely, including those joining from Borneo, Norway, Wales, and across Scotland. A full list of the participants may be found in [Annex 13](#). Detailed notes were taken by the research team and the webinar was recorded by the WebEx software, with participant consent.

To introduce the webinar discussion, Rob Mc Morran outlined the main themes from the desk-based evidence review and in-depth international case studies. A thematic analysis of the webinar notes and messages received by remote participants. is summarised below, structured around eight key discussion themes that emerged:

1. What do we mean by municipal landownership?
2. What legal forms of community ownership suit which context?
3. What types of assets do communities own?
4. Learning about limits to local capacity and long-term sustainability
5. Who is the community?
6. What learning exists regarding the human rights perspective on community ownership?
7. An international discourse around indigenous rights
8. The concept of 'non-community based' communal ownership



Theme 1: What do we mean by municipal landownership?

The question of whether municipal ownership can be characterised within the definition of state ownership of land was raised during the webinar. It surprised some participants to hear municipal as linked with state control of land, as it 'depends on the relationship between the municipality and the state administration in the country in question'. Norway was highlighted as an example of a system where common land is owned by the state through the 'Statsskog' (state forest company) and managed by local 'mountain boards', where board members are elected by the municipalities. Whether or not the municipality or the state has final control over the land resource is therefore a critical question, and whether control is devolved to local levels, thus an element of local governance.

Municipal landownership may also be considered a form of community ownership. However, it is highlighted that the larger the municipality, the less they are perceived as representing local interests. The notion of smaller municipalities as found in many other countries internationally (e.g. Norway and Germany, amongst others), and the degree of control over local assets, is considerably different to the current situation in the United Kingdom. It was noted by one participant that the European Federation of Municipal Forest Owners considers municipal ownership as distinct from both state and private ownership, therefore may be a third form of ownership.

Theme 2: What legal forms of community ownership suit which context?

The question arose whether different legal forms are particularly suitable, or not, with regard to different contexts of community or communal landownership. Webinar participants shared specific examples of models of ownership and legal criteria; these are summarised in Box 14.1.

Furthermore, the webinar participants questioned how best to assess the performance of these models and alternative structures. The researchers explained that they were interested in 'outcomes', as some of the different models had different aims, but most had common outcomes, e.g. using indicators around local community engagement in decision-making, fair distribution of land and tenure, etc. However, with 'community led housing', such initiatives can be compared as equal by the state, and the tendency arises to shift from considering local outcomes to number of house units created, for example. The webinar discussion also considered how to assess the performance of different types of community tenure and it was suggested that outcomes such as greater participation in the provision of community buildings was a good example of a way to measure success.



Box 14-1 Examples of models of ownership and legal criteria used in community ownership

- An interesting model exists in Scotland where the main community body (which meets legal and funder requirements for community membership, etc.) then establishes one or more trading subsidiaries to deliver elements of the work of the community body.
- The Community Empowerment (Scotland) Act 2015 sets out specific criteria to which an organisation must comply for a community acquisition of public land or buildings¹⁸⁸.
- Interesting models have been generated in England following Section 106 planning rules to create community ownership of land¹⁸⁹.
- Examples exist in Scotland of a Section 75 (equivalent to Section 106 in England) being used to give control of part of a development site to the local community for a garden, with income from part of the affordable housing element of the development going to a fund for the ongoing maintenance of that land.

The webinar participants described the interesting structure of ‘what is the problem, what is the model, and what is the outcome?’ In Scotland, it is often the case that communities respond to opportunities of land being put on the market, and commonly the opportunity presented is not the ideal model for community ownership (i.e. a whole estate rather than an asset to achieve a specified outcome). There is a need to place these structures in the context of the problem that they are trying to solve, and to reflect on where things go wrong, e.g. exclusion from assets and management control. The framework of challenges and opportunities as described during the research overview presentation was considered very ‘current’ and not historical. Webinar participants agreed that it might be helpful to reflect on historical aspects, i.e. which models of ownership have been sustainable or unsustainable? What challenges have these structures overcome? Why have historical changes occurred, political or otherwise? What mechanisms exist to adapt models of ownership to increase local democracy, participation and involvement in long-term land management and planning¹⁹⁰?

A final reflection within this theme was regarding the role of hybrid community ownership structures, for example, community-private partnerships. The webinar participants considered that the shared ownership of assets such as renewable energy

¹⁸⁸ See <https://dtascommunityownership.org.uk/community/community-rights/cea-part-5-asset-transfer/ownership-eligibility>

¹⁸⁹ See <https://www.local.gov.uk/pas/pas-topics/infrastructure/s106-obligations-overview> for an overview of Section 106 rules.

¹⁹⁰ Note that the case studies presented in the final report include much more detail about the historical context in each country than was possible to describe in the webinar presentation.



developments could progress community outcomes and are yet to be considered in sufficient detail within the community landownership debate.

Key theme 3: What types of assets do communities own?

It was noted by webinar participants that the scale of the asset is most frequently considered and compared, often instead of the asset value. Whilst community ownership in Scotland has predominantly focused on the acquisition of large rural estates, increasingly demand arises from communities who are keen to own buildings. As yet there has been less attention paid to urban community ownership or building-scale assets, although lessons can be learned in Scotland from the Community Land Trusts model that exists in the US and England.

The webinar participants noted that in Scotland there is a significant amount of land (i.e. including forests) and other assets (e.g. social housing) that are shifting from state to community ownership. A question arises therefore regarding the sustainability consequences of this shift, when the asset's previous use and plans for its development are considered. For example, webinar participants highlighted concerns that whether the asset is transferring from public or private ownership to community ownership, the assets tend to be those that have suffered market failure (e.g. marginal forest land, or failing services). There is a need for community caution regarding underlying neoliberal motivations in the drive for community asset ownership (e.g. a critique arising regarding community land trusts in England).

Key theme 4: Learning about limits to local capacity and long-term sustainability

It was reported that the burden of landownership was becoming too great in some remote rural communities of Scotland. The webinar participants were interested to learn whether other countries had suggestions regarding how to overcome limitations of local capacity, and issues of the longer-term sustainability of community and communal ownership of land. It was noted that in the US, there was a need to upscale CLT organisations, to professionalise, and to generate income in the longer term, whilst simultaneously continuing to engage meaningfully with the local community. This challenge related to the issues of scale of impact in urban contexts, as mentioned earlier.

One participant described how, in Burma, there are also limits to local capacity and fatigue around community participation. The tendency is that a few very motivated people undertake most of the responsibility around community ownership. It was explained that women are often excluded, with men adopting roles of responsibility, whilst marginalised voices and those with access to smaller parcels of land are less able to share their views.

Other participants, however, challenged the idea that community landowners are more likely to suffer from capacity constraints in comparison to other landowner types. They



suggested that private owners can also be limited by capacity, but these limitations are accounted for differently.

Key theme 5: Who is the community?

The challenges arising around community investment in Slovakia and consequences of failing businesses led to questions during the webinar discussion regarding what is meant by 'community'. Is everyone resident in a locality a member of the community for purposes of landownership? Across international models, are there any common, defining characteristics regarding what is 'community'? Conversely, are there characteristics or behaviour that would exclude a model of land governance from being described as community ownership?

It was explained by one webinar participant that in Scotland, with regard to the legislation dealing with asset transfer (the Community Empowerment (Scotland) Act 2015), there are provisions for ownership by communities of interest, for example allotment societies can become community landowners through asset transfer. Many community woodland groups in Wales are defined as 'communities of interest', rather than communities of place, the latter of which may be better represented by citizens of a community council area. Community councils are the smallest unit of governance across the UK and can allow input from those who don't have a direct interest in the management or development of land.

From a Scottish perspective, it was explained that when community ownership began over three decades previously, community organisations were self-defined, and it is only recently that what is a 'community' has become increasingly formalised. Communities have largely worked within a legal and advisory framework which tends to be dictated by and adapted to the iterations of funding and legislative changes. Community landownership has been 'channelled' to respond to important questions of market failure, but then this can result in the management of difficult assets, as described in Theme 3 above. There are arguably no mechanisms yet available for communities in Scotland to challenge issues arising from the unequal benefits of private landownership.

It is suggested that in coming decades, community ownership will have shifted to mechanisms of collective ownership, and it may be more difficult to identify the difference between community of place, community of interest, and collective ownership. Can a group of people getting together to buy land for food growing be consider community or collective ownership?

It was mentioned that different narratives are used to appeal to the authorities to grant different access claims; there is a historical process of building political will to build legitimacy around different community ownership mechanisms.



Key theme 6: What learning exists regarding the human rights perspective on community ownership?

The webinar discussion considered to what extent the current research is focused on a human rights dimension. It is noted that until recently, in Scotland, human rights have arguably been a shield to deflect reform, and there is little knowledge regarding land governance structures that account for human rights outwith Scotland. This relates to the Scottish Land Commission's wish to understand how community landownership manifests and is normalised outside of Scotland. What lessons can be learned for Scotland from other models to inform our evolutionary path? How do other drivers, including the concentrated pattern of private landownership, affect empowering communities and the outcomes that they seek? Questions also arose regarding who else should be involved in these enquiries and the range of discussions required to build understanding.

It was highlighted that with regard to human rights, there is an important distinction between title and democratic structure; it is therefore difficult to compare legal structures directly across different jurisdictions. The question of human rights in Scotland has to be approached with a degree of care, as there is no codified written constitution, but the land reform debate considers how to align rights within the constitutional arrangements and human rights framework that exists in Scotland. How is democracy reflected in governance structures? If land is taken into state ownership in the US, there are different outcomes compared to when this occurs in Norway, for example, due to the varied historical and social development of these two countries.

Key theme 7: An international discourse around indigenous rights

The webinar participants considered the cases of people who do not have legal rights to landownership, but they want their indigenous rights recognised in the law. The question arose regarding the extent to which these systems were considered in earlier research projects [i.e. Mc Morran et al., 2018]. Were the communities studied motivated to reach 'full ownership', or were they satisfied with use rather than ownership rights? The possibility for a shift in Western terminology regarding rights to land was mentioned.

Questions arose during the webinar regarding legal title and indigenous rights. For example, in Burma, where indigenous rights are not recognised in the law, legal titling of land is used by the government, but also involves community negotiations and discussions regarding land use at the village level. Webinar participants explained that this process and the formalisation of community wishes requires non-governmental organisation support. Similarly, the ejidos in Mexico are recognised as par to the local governance structure, which empowers communities to have an 'official voice' in land use decision-making. The webinar participants reflected that many models of community and communal landownership can overcome a lack of or enhance local governance.



The question also arose during the webinar discussion regarding models of land rights where non-human aspects of nature are granted legal personalities and provided with guardians, rather than owners, for example, the Whanganui river in New Zealand. Giving rights to nature was an aspect of radical environmentalism that began in the 1970s, and recent legislation in New Zealand has reflected indigenous conceptualisations of nature. This involves guardians appointed on behalf of indigenous cultures, and on behalf of the Crown. The recognition of the rights of nature has also taken place recently in Colombia and India through judicial decision. However, in India, the rights of rivers are more contested, and the relevant case is currently being appealed.

Key theme 8: The concept of 'non-community based' communal ownership

Within Europe, the ownership of land by third-sector organisations, for example conservation charities, is not widely represented beyond the UK. The role and influence of large, open membership non-governmental organisations in the landownership pattern of Scotland was discussed during the webinar. Questions were raised regarding the different objectives or 'intersect of interests and wishes' of the national-level organisations with those held by local communities. These organisations may be considered 'community of interest' landowners according to their governance arrangements, and it may be questioned whether they have the same power as a community of place within landownership and land rights discourse. Others within the webinar discussion proposed these types of owners are allocated the same rights as 'club' owners. The webinar participants asserted that the space between club ownership and public ownership was interesting and important for further exploration.

Summary

The discussion raised questions regarding the definition of 'municipal' landownership, and whether the municipality or the state has final control over the land resource. Municipal landownership may also be considered a form of community ownership. However, it was highlighted that the larger the municipality, the less they are perceived as representing local interests. The critical issue discussed was whether municipal ownership devolves deciding-making power to local levels, and therefore enhances local governance in land.

The example of community land trusts in the US illustrates the challenges around scale of governance and the involvement of communities. Thus, whilst the CLTs were required to increase in scale, they were also required to continue meaningful community engagement; this challenge is also common to municipal landownership.

The discussion highlighted the importance of recognising suitable and desirable outcomes for communities, of which landownership can be a supportive tool. For example, the shared ownership of assets such as renewable energy developments could progress community outcomes and there is scope for further investigation regarding legal models.



Webinar participants raised concerns of sustainability, depending on the previous use of an asset that is being transferred to community ownership, in particular where assets have previously suffered market failure whilst owned by the public or private sector. The future development potential of an asset is of critical importance.

Debate arose during the webinar discussion regarding capacity limitations affecting community landowners. Whilst Scottish and international examples illustrated the capacity constraints facing some community landowners, it was also highlighted that other landowner types, including private owners, must also overcome fatigue and constraints to capacity. The question arises therefore how these different landowner types characterise and overcome limits to capacity, and what lessons can be learned for community landowners.

The participants suggested that in the coming years, community ownership in Scotland may shift increasingly to mechanisms of collective ownership, and it may become more difficult to distinguish between community of place, community of interest, and collective ownership.

The question of human rights is significant in Scotland as there is no written constitution, but the land reform debate considers how to align rights within the constitutional arrangements in Scotland. The webinar discussion emphasised the question of how democracy is reflected in governance structures. The webinar highlighted that a variety of models exist that support community and communal landownership, and that seek to overcome a lack of or enhance local governance.

Relatedly, the process of securing indigenous rights to land internationally, and the formalisation of community wishes requires non-governmental organisation support. However, questions were raised regarding the 'intersect of interests and wishes' of national-level organisations with those held by local communities.